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A. N. Yiannopoulos

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REAL RIGHTS IN LOUISIANA AND COMPARATIVE
LAW: PART I

A. N. Yiannopoulos*

Rights, whatever this word may mean in the framework of a concrete legal system,¹ may be classified according to a variety of criteria. Philosophically inclined jurists in various parts of the world have established in their efforts at systematization of the law classifications of rights varying from the abstractions of a purely analytical jurisprudence to the creation of working concepts tested by the functional method.²

Modern American scholars postulate a classification of "interests" (rather than "rights") into the broad categories of interests in personality, interests in property, and interests in relations.³ This tripartite division could, perhaps, be adopted for the purpose of a meaningful analysis of civilian institutions.⁴ Civilian commentators, however, have not as yet fully explored this lucid approach. Analysis of civilian institutions is ordinarily based, in accordance with a perennial tradition, on the analytically questionable dichotomy of rights into "patrimonial" and "extra-patrimonial."⁵ Patrimonial rights are those sus-

*Research Associate Professor of Law, Louisiana State University.

1. 4 POUND, JURISPRUDENCE 56 (1959): "There is no more ambiguous word in legal and juristic literature than the word right."

2. See 2 AUSTIN, JURISPRUDENCE 760 (1885); KOCOUREK, JURAL RELATIONS 29-49 (1927); PATON, A TEXT-BOOK OF JURISPRUDENCE 231-40 (1951); 4 POUND, JURISPRUDENCE 41-90 (1959); STONE, THE PROVINCE AND FUNCTION OF LAW 68-69, 124-30 (1950); 1 WINDSCHEID, LEHRBUCH DES PANDEKTENRECHTS 87 (1891). Cf. DUGUIT, LES TRANSFORMATIONS GÉNÉRALES DU DROIT PRIVÉ DEPUIS LE CODE NAPOLEON 13 (1912) (suggesting avoidance of the obnoxious term "right").

3. See Green, *Basic Concepts: Persons, Property, Relations*, 24 A.B.A.J. 65 (1938); *id.*, *Relational Interests*, 29 ILL. L. REV. 460, 1041 (1934); 30 ILL. L. REV. 1, 314 (1935); 31 ILL. L. REV. 35 (1936); GREEN, MALONE, PEDRICK, & RAHL, CASES ON INJURIES TO RELATIONS, Foreword (1959). Cf. 3 POUND, JURISPRUDENCE 25-30 (1959).

4. Analysis of legal institutions in terms of protected interests rather than rights was first suggested by Jhering. See JHERING, DER ZWECK IM RECHT 467-83 (1877); *id.*, 3 GEIST DES RÖMISCHEN RECHTS 317-54 (1871).

5. Cf. 1 CARBONNIER, DROIT CIVIL 133-36, 235-36 (1955); 1 ENNECCERUS-

ceptible of pecuniary evaluation, and which, for this reason, may form part of a person's "patrimony."⁶ All other rights are extra-patrimonial. In this last category are frequently included "right of personality" and "family rights."

According to a rigorous traditional classification, patrimonial rights are either "personal" or "real."⁷ This dichotomy can be fully grasped only in the light of the civilian tradition which distinguishes sharply between the law of property and the law of obligations. The real right appears as a right which a person has in a thing, a matter of property law. The personal right is a right which a person has against another person to demand a performance, a matter of the law of obligations. In this light, despite certain similarities, the two kinds of rights appear to be of different natures. A usufructuary and a lessee, according to appearances, seem to have the use and enjoyment of a house in much the same way. But, technically, the usufructuary has a right in the enjoyment of the house; the lessee has a right against the owner of the house to let him enjoy the house. One has a *real right* and the other a *personal right*.

The notion of real rights as a systematic generalization is firmly established in all western systems of law, though its content and precise meaning may differ among particular systems.⁸ In this study, real rights will be discussed with reference to the civilian tradition, with attention focused on Louisiana law. For purposes of comparison, brief reference will be made to the findings of analytical jurisprudence, designed to explain the function of real rights within the framework of Anglo-American law. Analysis of Louisiana law will be preceded, for historical reasons, by a brief analysis of Roman law and French law.

NIPPERDEY, ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS 291-302 (1952); LEHMANN, ALLGEMEINER TEIL DES B.G.B. 80 (1957).

6. On the notion of "patrimony," see 1 CARBONNIER, DROIT CIVIL 137 (1950); 2 *id.* 1-9 (1957); 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 19-30 (1952).

7. See BAUDRY-LACANTINIERE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL, 5 SUPPLEMENT by BONNECASE 1-2 (1930); 2 CARBONNIER, DROIT CIVIL 31 (1957); 9 DEMOLOMBE, TRAITÉ DE LA DISTINCTION DES BIENS 337 (1874-82); 1 EHRENZWEIG, ALLGEMEINER TEIL DES ÖSTERREICHISCHEN PRIVATRECHTS 125-30 (1951); 1 ENNECCERUS-NIPPERDEY, ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS 291 (1952); 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 41 (1952) (with bibliography); 1 WINDSCHEID, LEHRBUCH DES PANDEKTENRECHTS 95 (1891).

8. See GINOSSAR, DROIT RÉEL, PROPRIÉTÉ ET CRÉANCE 1-2 (1960); Gieseke, *Belastung*, in 2 RECHTSVERGLEICHENDES HANDWÖRTERBUCH 426 (1929).

I. ROMAN LAW

The term "real rights" (*jura in re*) is an abstraction unknown to classical Roman law.⁹ The classical jurists were preoccupied with the availability of remedies rather than the existence of *substantive* rights, and did not have a generic term to include all "rights" which civilian scholars of following generations classified as "real." The expression ("real rights") was first coined by medieval writers elaborating on the *Digest* in an effort to explain ancient procedural forms of action in terms of substantive rights.

Actions in Roman law were classified as either personal (*actiones in personam*) or real (*actiones in rem*).¹⁰ The terminology reflected certain peculiarities of the Roman forms of action. In personal actions, the *intentio*, namely that part of the writ (*formula*) in which the cause of action was stated, indicated the name of the defendant; in real actions there was reference to the name of only the plaintiff in the *intentio*, and the name of the defendant first appeared in another part of the writ, the *condemnatio*. The distinction, though originally regarded as one of form and procedure, carried significant substantive implications: an *actio in personam* involved a demand against a certain person for the performance of an *obligatio*; an *actio in rem* involved a demand for the restitution of a *res*. Actions for enforcement of obligations were always personal. Obligations were conceived as a bond between a certain plaintiff and a certain defendant, and there could be no cause of action unless the name of the defendant appeared in the *intentio*. In contrast to obligations, actions for the enforcement of ownership rights, real security, and family or inheritance rights were founded not on a duty owed by a certain defendant to a certain plaintiff but on a claim that the holder of the right had against anyone. Accordingly, identification of the defendant was essential only for the purpose of sentencing him to restore these violated rights.

These peculiarities connected with the enforcement of claims in Roman law were rationalized by medieval scholars as in-

9. See SCHULZ, *CLASSICAL ROMAN LAW* 335 (1951); 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 41, n. 2 (1952). Cf. Villey, *Le jus in re du droit romain classique au droit moderne*, in 2 *PUBLICATIONS DE L'INSTITUT DE DROIT ROMAIN DE L'UNIVERSITÉ DE PARIS* 207 (1947).

10. See JUSTINIAN, *INSTITUTES* 4.6.1: "*Omnium actionum . . . summa divisio in duo genera deducitur: aut enim in rem sunt aut in personam*"; SOHM-MITTEIS-WENGER, *INSTITUTIONEN DES RÖMISCHEN RECHTS* 686 (1923); 9 DEMOLOMBE, *TRAITÉ DE LA DISTINCTION DES BIENS* 343 (1874-82); LAWSON, *A COMMON LAWYER LOOKS AT THE CIVIL LAW* 102 (1953).

volving a distinction between *absolute rights* (i.e., rights available against everyone) and *relative rights* (i.e., rights available only against a particular defendant). Among the absolute rights were included, quite naturally, ownership and its dismemberments, like usufruct and servitude: these were *res*, protected by an *actio in rem*. These proprietary interests were in turn given the collective denomination "real rights" (*jura in re*) in contrast to merely "personal rights," namely obligations, which were enforceable by an *actio in personam*. Further elaboration on the Roman texts seemed to warrant the validity of this analytical dichotomy by reference to another distinguishing feature: "real rights" conferred a direct power or authority over a thing while merely "personal rights," even when relating to things, conferred power over another person who, in turn, was "obligated" to make a performance.¹¹ The real rights in Roman law were limited in number. They were ownership, use, habitation, usufruct, servitudes, pledge, real mortgage, superficies, and emphyteusis. Ownership was a real right in one's own thing, a *jus in re propria*. All other real rights were interests in things belonging to somebody else, *jura in re aliena*.

This is in substance the doctrine of real rights as developed in middle ages on the basis of the Roman texts. The doctrine was compatible with the feudal structure of medieval economy, and was further developed to accommodate feudal tenures which came to be regarded as new species of real rights attaching to land.¹² In that regard, departure from Roman law standards occurred not only through the increase of the number of real rights but also through the development of "personal" servitudes, involving affirmative duties due by tenant to a landlord.

II. FRENCH LAW

The French Civil Code does not draw a formal distinction between "personal" and "real" patrimonial rights. Doctrine and jurisprudence, however, have established this analytical distinction in France by reference to a number of articles in the Code Civil. The establishment of the distinction necessitated further analysis of the definitions of real and personal rights, analysis of their respective natures, and their contrast with one another.

11. See SOHM-MITTEIS-WENGER, INSTITUTIONEN DES RÖMISCHEN RECHTS 264 (1923); WEISS, INSTITUTIONEN DES RÖMISCHEN PRIVATRECHTS 13 (1949); LEACH, ROMAN PRIVATE LAW 134 (1948); 1 HUVELIN, COURS ÉLÉMENTAIRE DE DROIT ROMAIN 416 (1927).

12. See 9 DEMOLOMBE, TRAITÉ DE LA DISTINCTION DES BIENS 406 (1874-82).

A. *Personal Rights*

"Personal rights" are neither enumerated nor defined in the Code Civil. Doctrine and jurisprudence, relying mostly on Articles 1101, 1126, and 2092 of the Code Civil,¹³ arrived at the broadly accepted definition that a personal right is the power which a person (creditor) has to demand from another person (debtor) a performance.¹⁴ This performance may consist in giving, doing, or not doing, a thing. Conversely, a personal duty (obligation) is the legal bond by which the debtor is constrained — under the control and guarantee of the State — to furnish a performance to the creditor.

The personal right appears as a subjection of one person to another. Actually, it is only the patrimony of the debtor that is subjected to the authority of the creditor. Whether the performance relates to something patrimonial or to an act of a personal character, the ultimate responsibility of the debtor is a financial one: a sum of money paid as damages in case of non-performance (Article 1142). This is expressed in the adage "who obliges obliges his own" — namely, patrimony. It is also said that the creditor has a general pledge on the property of his debtor (Article 2093). This is not a pledge in the technical sense which would constitute a veritable real right (*cf.* Article 2073). It is merely a right of seizure that the creditor has: the patrimony of the debtor, as it exists at the time payment is due, may be subjected to seizure for the satisfaction of the creditor. Thus, in the last analysis, the personal right may be regarded as a right to a fraction of the debtor's patrimony.

All obligations may thus be reduced to the same pecuniary denominator, whether they are money obligations from their inception or are later converted into a claim for damages as a result of nonperformance. This "homogeneity"¹⁵ of all obligations carries practical consequences which become apparent in concursus proceedings. Where the value of the property seized is insufficient to satisfy all creditors, satisfaction will be pro-

13. *Cf.* LA. CIVIL CODE arts. 1761, 1126, 2092 (1870).

14. See 4 AUBRY ET RAU, COURS DE DROIT CIVIL FRANÇAIS 6 (1935); BAUDRY-LACANTINERIE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL, 5 SUPPLEMENT by Bonnecase 12 (1930); 2 CARBONNIER, DROIT CIVIL 33 (1957); 1 DEMOGUE, 4 TRAITÉ DES OBLIGATIONS EN GÉNÉRAL 3 (1923); 9 DEMOLOMBE, TRAITÉ DE LA DISTINCTION DES BIENS 339 (1874-82); 2 JOSSEERAND, COURS DE DROIT CIVIL POSITIF FRANÇAIS 1 (1933). *Cf.* 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 47 (1952).

15. See 2 CARBONNIER, DROIT CIVIL 34 (1957).

portionate to approved claims. This postulates that as between all holders of personal rights money is the common measure of satisfaction (Article 2093).

B. Real Rights

The French revolution wiped out the feudal tenures and threatened with extinction the very notion of "real rights." The redactors of the French Civil Code, however, struck a happy balance between the demand for a free and unencumbered ownership and the need for recognition of several proprietary interests less than full ownership, whether created by party agreement or by operation of law. Thus, the system of the French Civil Code precludes the resurrection of feudal tenures and at the same time permits the creation of property rights in things owned by someone else. The term "real rights" has been avoided meticulously except in connection with real mortgage¹⁶ but a number of interests are recognized which bear traditional names and function as the ancient real rights did.

There has been no generally accepted definition of the term "real rights" in French law. In that respect, it has been said that there are as many definitions as there are commentators.¹⁷ This is understandable because definition of this term is involved, necessarily, with the highly controversial nature¹⁸ of real rights. According to a broadly accepted definition, a real right is the judicially recognized authority which enables a person to draw from a thing directly all or part of its economic advantages.¹⁹ The thing appears subjected to the authority of a person — one speaks of a right in the thing — and figures as an essential feature in the legal relationship. This, however, is a metaphor because, by definition, things cannot "participate" in a legal relationship.²⁰

The traditional and generally accepted enumeration of real rights includes ownership, use, habitation, usufruct, servitudes,

16. See CODE CIVIL art. 2114, § 1: "*L'hypothèque est un droit réel . . .*" Cf. LA. CIVIL CODE art. 3282 (1870): "The mortgage is a real right . . ."

17. See 1 ORTOLAN, *EXPLICATION HISTORIQUE DES INSTITUS DE L'EMPEREUR JUSTINIEN* 72 (1951).

18. See text at notes 43-48 *infra*.

19. See BAUDRY-LACANTINIERE, *TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL*, 5 SUPPLEMENT by Bonbecase 11 (1930); 2 CARBONNIER, *DROIT CIVIL* 32 (1957); 1 DEMOGUE, *TRAITÉ DES OBLIGATIONS EN GÉNÉRAL* 5 (1923); GINOSSAR, *DROIT RÉEL, PROPRIÉTÉ ET CRÉANCE* 3 (1960); 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 41 (1952).

20. See 2 CARBONNIER, *DROIT CIVIL* 32 (1957); 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 42 (1952).

mortgage, and pledge. All these rights are established and regulated by the Code Civil.²¹ Then, privileges, superficies, mineral rights, and emphyteusis are added as having their foundation in the Code,²² special legislation,²³ or court action.²⁴ Certain authors are inclined to add the lessee's right under a predial lease to this list since this right may be asserted against third parties.²⁵ But the Court of Cassation has repeatedly held that predial leases are personal contracts²⁶ despite code provisions and statutory legislation which have strengthened the position of the lessee vis-a-vis the landowner and third parties.²⁷ Apart from the real rights created and regulated by the civil law, there are known in France "real rights" established and governed by administrative law.²⁸ These rights are granted by the public authorities to private persons for exclusive use and enjoyment of things belonging to the public domain. Unlike the real rights of the civil law, these "administrative" real rights are temporary and revocable; but in all other respects they function as veritable real rights, for they confer a right in the thing which can be

21. See CODE CIVIL arts. 544-577 (ownership); 578-636 (usufruct, use and habitation); 637-710 (servitudes); 2071-2091 (pledge); 2114-2203 (mortgage). Cf. 2 CARBONNIER, DROIT CIVIL 32 (1957); 9 DEMOLOMBE, TRAITÉ DE LA DISTINCTION DES BIENS 337 (1874-82).

22. *Privileges*: see CODE CIVIL arts. 2092-2113. The question of the juridical nature of privileges has been discussed in France extensively. See BAUDRY-LACANTINIERE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL, 5 SUPPLÉMENT by Bonne-case 437-510 (1930); text at notes 279-287 *infra*. With respect to *superficies*, see 9 DEMOLOMBE, TRAITÉ DE LA DISTINCTION DES BIENS 368 (1874-82). Cf. CODE CIVIL arts. 553, 664, 519; text at notes 73-89 *infra*. With respect to *emphyteusis* see Cass. Dec. 15, 1824, D. 1824. 1.96. Cf. DEMOLOMBE, *op. cit. supra* at 379; text at notes 90-104 *infra*.

23. See Law of April 21, 1810 (mineral rights). Cf. 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 523 (1952). See also Law of June 25, 1902 (emphyteusis). Cf. PLANIOL, *op. cit. supra* at 985.

24. See 9 DEMOLOMBE, TRAITÉ DE LA DISTINCTION DES BIENS 392 (1874-82) asserting that emphyteusis, having been abolished by the Civil Code, was resurrected by the courts. Cf. 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 986 (1952).

25. See 6 MERLIN, RECUEIL ALPHABÉTIQUE DES QUESTIONS DE DROIT, Tiers § II, 389 (1820); 1 TROPLONG, DE L'ÉCHANGE ET DU LOUAGE 60 (1859); DERBUPPÉ, LA NATURE JURIDIQUE DU DROIT DU PRENEUR À BAIL ET LA DISTINCTION DES DROITS RÉELS ET DES DROITS DE CRÉANCE (Diss., Toulouse 1952); Savatier, *Essai d'une présentation nouvelle des biens incorporels*, 56 REVUE TRIMESTRIELLE DE DROIT CIVIL 331, 339 (1958). Cf. DAINOW, LA NATURE JURIDIQUE DU DROIT DU PRENEUR À BAIL DANS LA LOI FRANÇAISE ET DANS LA LOI DU QUÉBEC 24-26 (Diss., Dijon, 1931); GINOSSAR, DROIT RÉEL, PROPRIÉTÉ ET CRÉANCE 168-79 (1960).

26. See Cass., March 6, 1861, D.61.1.417, S.61.1.713; Feb. 21, 1865, D.65.1.132, S.65.1.113 and recent jurisprudence collected in 10 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 760, notes 1-7 (1956).

27. See CODE CIVIL arts. 1709, 1743; Law of Sept. 1, 1948 (rent legislation); Decree of Sept. 30, 1953 (commercial property); RURAL CODE art. 790 (1955) (agricultural exploitation).

28. See 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 55 (1952).

asserted against all but the granting public authorities. In this category belong the rights of riparian landowners in public roads, concessions in cemeteries, canals, and railroads, and the rights that ministers of faith and members of a congregation have in their religious establishments.

For systematic purposes, real rights are distinguished as *principal* or *accessory*.²⁹ The principal real rights pertain to the substance of the thing which is placed to the service of the holder of the right. The accessory real rights (*i.e.*, accessory of obligations of which they guarantee payment) pertain to the pecuniary value of a thing. This value has been reserved to satisfy the interests of the holder of the right. Principal real rights are the right of ownership and its permissible dismemberments: use, habitation, usufruct, predial servitudes, and emphyteusis. Accessory real rights are the rights of real mortgage, pledge, privileges on immovables, and special privileges on movables (whose nature is controversial).³⁰

The question whether individuals may create *new* real rights or work modifications on the real rights established in the Code Civil has been a highly controversial issue in France. Article 543 of the Code Civil provides that "one may have in things either a right of ownership or a simple right of enjoyment or only the right to claim predial servitudes thereon." In the *Exposé des Motifs*, accompanying the promulgation of the Code, it is stated that:

"These are actually the only modifications of which ownership is susceptible in our political and social organization; there cannot be in things any other species of rights: one has either a complete and perfect ownership which includes the right to enjoy and to dispose of; or one has a simple right of enjoyment without being able to dispose of the land; or, finally, one has only the right to claim predial servitudes on the property of another; servitudes which cannot be established but for the use and utility of an estate; servitudes which do not entail any affirmative duties of the person; servitudes, finally, which have nothing in common with feudal tenures, destroyed forever."³¹

29. See 2 CARBONNIER, DROIT CIVIL 32 (1957); 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 46 (1952).

30. See BAUDRY-LACANTINERIE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL, 5 SUPPLÉMENT by Bondecase 463-510 (1930).

31. See EXPOSÉ DES MOTIFS by Mr. Treilhard, 11 FENET, RECUEIL COMPLET

In the absence of a legislative text directly in point, however, the prevailing view in France is that contractual freedom ought to be respected provided that the limits of public policy are not transcended.³² Thus, neither feudal tenures may be resurrected nor interests created contrary to Articles 530 and 686 of the Code Civil. Within these broad limits individuals may create new real rights by dismembering their ownership as they see fit, and work modifications on existing real rights. This view is supported by the maxim that what is not forbidden is permitted, and by the code provisions declaring that individuals have the freedom to dispose of their property by onerous or gratuitous title, in whole or in part, according to combinations that they consider convenient to adopt, provided that these combinations are not contrary to public policy (Articles 437, 544, 1134). A stumbling block, the enumeration of real rights in Article 543, was set aside: this enumeration is incomplete and, quite naturally, this article was interpreted as illustrative rather than exclusive. As early as 1834, the Court of Cassation declared that "Articles 544, 546, and 552 of the Code Napoleon are declaratory of the general law concerning the nature and effects of ownership, and not prohibitive; neither these articles nor any other law may exclude the various modifications and dismemberments of which the ordinary right of ownership is susceptible."³³ The prevailing view is further supported by realistic considerations of general utility and convenience: different advantages which ownership of a thing confers may be enjoyed by different people, to the best interests of society. But it has been observed that split ownership may be the source of frequent litigation and may hinder effective exploitation of wealth.³⁴

A minority view, tending to restrict party autonomy, rests primarily on the proposition that the parties to a contract cannot derogate from laws of public policy (Articles 6, 1133, 1172) and that the rules concerning security of acquisition and transfer of ownership are rules of this nature.³⁵ For the same reasons that parties may not by agreement subject to a real mortgage things other than those enumerated in Article 2115 of the Code Civil, they cannot modify existing real rights or create new ones.

DES TRAVAUX PRÉPARATOIRES DU CODE CIVIL 33 (1836).

32. See 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 54 (1952); Cf. 2 TOULLIER, *LE DROIT CIVIL FRANÇAIS* 27 (1833).

33. Cass., Feb. 13, 1834, D.1834.1.205, S.1834.1.206. See also Amiens, Dec. 2, 1835, S.1835.2.198.

34. See 9 DEMOLOMBE, *TRAITÉ DE LA DISTINCTION DES BIENS* 431 (1874-82).

35. See *id.* at 431-32.

According to this view, the real rights which individuals may establish must necessarily be some of the rights enumerated in Articles 543 and 2114 of the Code, namely, ownership, use and habitation, usufruct, predial servitudes, and mortgages.³⁶ It is only within these limits that party autonomy may move freely. If a right does not fall within these well-established categories, it is a *personal* right under the Code. And it has been suggested that most of the modifications of ownership recognized as valid by the French courts actually fall within these accepted categories.³⁷

French courts have recognized as permissible dismemberments of ownership the right to hunt,³⁸ the right to own trees on another's land,³⁹ and the right of ingress and egress in order to cut timber.⁴⁰ Land ownership may thus be divided vertically and horizontally. Ownership may also be fractioned in such a way that one person may have the enjoyment of the land while overflowed by water, and another person when the land is dried up, provided that this occurs in regular intervals.⁴¹ But while party autonomy has been recognized in principle, little use of this facility has been made in practice. The reason for this paucity is that any new real right should necessarily be a dismemberment of ownership and the law itself provides for and regulates most socially useful dismemberments. Inventiveness and imagination necessarily function within a field pre-empted by law and prescribed by rules of public policy. Moreover, new real rights created by the exercise of party autonomy must conform to certain formalities and be recorded in order to be asserted against third parties. But recordation is ordinarily available only for transactions and rights described specifically in applicable statutes.⁴²

C. *Real Rights and Personal Rights Contrasted*

A number of differences between the established categories of personal and real rights are noticeable in most cases. However, the existence of intermediary categories of rights which

36. See 1 COLIN, CAPITANT ET JULLIOT DE LA MORANDIÈRE, *TRAITÉ DE DROIT CIVIL* 958 (1953); GINOSSAR, *DROIT RÉEL, PROPRIÉTÉ ET CRÉANCE* 147 (1960).

37. See 9 DEMOLOMBE, *TRAITÉ DE LA DISTINCTION DES BIENS* 437 (1874-82).

38. See Amiens, Dec. 2, 1835, S.1935.2.198.

39. Cass. Dec. 26, 1833, Gaz. Pal. 1833. 1108; Feb. 20, 1851, D.1851.1.54.

40. Caen, Feb. 17, 1837, 1 REC. DE CAEN 187, 38 REP. DALLOZ 202 (1857).

41. Cass. Jan. 31, 1838, Dev. 1838.1.120.

42. See 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 55 (1952).

tend to blur distinctions is also noticeable. Any contrast, therefore, must be viewed primarily as a device for systematic analysis. The differences between personal and real rights, when noticeable, relate to the nature, structure, and function of the respective rights.

There has been much discussion in France concerning the respective nature of real and personal rights. Diametrically opposite views have been advanced, tempers have flared, and the discussion still goes on.

According to the traditional definition, real rights are said to involve subjection of a thing, in whole or in part, to the authority of a person by virtue of a direct relationship which can be asserted against the world.⁴³ This definition postulates a direct legal relationship between the holder of the right as *subject* and the thing as *object*. By contrast, personal rights involve relations between persons, the creditor being an active subject and the debtor a passive subject.

The traditional analysis of the respective nature of real and personal rights has been subjected to severe criticism by a number of modern writers. These writers ("personalists") have pointed out that, by definition, rights involve relations between persons and that the postulation of a direct legal relationship between a person and a thing is "nonsense."⁴⁴ The only possible direct relation between a person and a thing is factual rather than legal. This is possession, *i.e.*, the physical control that a person may exercise over a thing.

According to the personalist writers a real right constitutes a *universal passive obligation* and is defined as "a legal relationship established between one person as active subject and all other persons as passive subjects."⁴⁵ This legal relationship is of the same nature as all obligations. It imposes a (passive) duty to refrain from interferences with the peaceful possession of the holder of the real right. The creditor of the obligation is the holder of the real right and the debtors are an unlimited number of persons. Because of the passive role attributed to the debtors, attention is ordinarily focused on the creditor-holder

43. Cf. note 18 *supra*; MICHAS, LE DROIT RÉEL CONSIDÉRÉ COMME UNE OBLIGATION PASSIVEMENT UNIVERSELLE 68 (1900).

44. 3 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 42 (1952).

45. *Id.* at 43.

of the real right — and the idea of a direct relationship between a person and a thing emerges. But though one may tend to lose sight of the passive debtors, they still exist in the background, and the obligation imposed against the entire world becomes visible in case of interference with the possession of the holder of the right. The one interfering is liable to pay damages which would be inconceivable in the absence of a previous obligation to refrain from interference. Thus, certain of these writers, following their analysis to its logical conclusion, fail to see any difference between real and personal rights: patrimonial rights may be distinguished only by reference to their stronger or weaker variable content.⁴⁶ Most personalist writers, however, concede the validity of the distinction between personal and real rights for *systematic* and *practical* purposes, despite lack of difference as to the respective nature of these rights.

According to the personalist doctrine, both real and personal rights derive from “obligations,” and their constitutive elements are the same. They differ only with regard to the number of the passive subjects involved and the scope of the duties assumed. Personal rights always involve a limited and determined number of obligors; real rights involve an unlimited and undetermined number of obligors. Personal rights are thus *relative*; real rights are *absolute*. As to the scope of the obligations assumed, it is observed that real rights conceived as universal passive obligations are *static* and may impose only negative duties. Conversely, personal rights are *dynamic* and may impose both negative and affirmative duties.

Critics of the personalist approach indicate that the assumption of a *universal* obligation is a fiction.⁴⁷ Persons who never come into contact with the holder of a real right cannot be regarded as bound by an “obligation.” The passive subjects of the universal obligation are indefinite and undetermined; they become determined only when they interfere with the free exercise of a real right by its holder. Thus, in the absence of any interference, it is not logical to define the nature of a right by reference to unknown and undetermined “obligors.” There is, perhaps, a universal obligation to respect a real right but similar obligations exist in connection with *all* so-called “absolute” rights. This doctrine, therefore, fails to offer distinguishing

46. See DEMOGUE, NOTIONS FONDAMENTALES DU DROIT PRIVÉ 440 (1911).

47. See BAUDRY-LACANTINIERE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL, 5 SUPPLEMENT by Bondecasse 50 (1930).

features explaining the prerogatives of the holder of a real right and the content of his authority.

An effort at reconciliation of the conflicting doctrines has been made in France on the assumption that real rights involve two aspects. Externally, real rights appear as obligations imposed on all persons to respect the position of the holder of these rights — passive obligations which become active when a certain person is under a duty to restore possession of a thing to the holder of the right. Internally, real rights appear as *power* over a thing which the holder of a real right has. This power is protected by law and is not merely a factual relationship. Further, all attributes of this power are controlled and regulated by law, and this feature distinguishes real rights from obligations. Still further, the holder of a real right is able to create new legal relations concerning the thing which can be asserted against third parties. Accordingly, real rights are defined as those rights which impose a general obligation to respect the power which the law confers on a certain person to derive from things the whole or only part of the advantages which their possession entails or as those rights which confer on a person a direct and immediate authority over a thing which is operative not only against a certain person but against the world.⁴⁸

Structural differences between personal and real rights are manifested in a number of practical consequences.

In the first place, the holder of a real right may abandon it by his unilateral act. Abandonment enables the holder of a real right to avoid obligations and charges attached to a thing (Articles 656, 699, 2172). On the contrary, the creditor of an obligation cannot renounce his right to a certain performance unilaterally. The remission of a debt is a *contract* and the consent of the debtor indispensable.

Secondly, the personal right is effective only between the parties and, in principle, cannot be asserted against third parties (Article 1165). Third parties may disregard personal rights and only in exceptional cases may they be held for having intentionally interfered with a contractual relationship. The real right, as a right in the thing, may be asserted against the world and every one must respect it and refrain from unauthorized

48. See 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 46 (1952). But cf. GINOSSAR, *DROIT RÉEL, PROPRIÉTÉ ET CRÉANCE* 182 (1960), defining real rights as those generating real obligations.

interferences. These differences tend to disappear in certain instances. Thus, not only negative duties but also affirmative ones may be due to holders of real rights by virtue of police regulations or provisions of the Code Civil (Articles 646 and 663). Further, according to a modern trend, an increasing number of personal rights may be asserted against third parties. Social and economic interests have generated a movement tending to secure to third parties benefits deriving from contractual relations existing among other parties. This trend is also apparent in the field of delictual responsibility. Finally, the "obligation" to respect the life, honor, and health of another, correlative to the so-called "right of personality," is similar to one deriving from a real right. It is a universal passive obligation to abstain from unauthorized interferences.

Thirdly, real rights are so closely interwoven with their object that they cannot exist apart from it. Ownership, usufruct, and servitudes are inconceivable without an object which must be an existing and individually determined thing. To the contrary, the object of obligations need be determinable only by quantity and quality, i.e., as *genus* rather than *species*, and may be a future thing. Strictly speaking, therefore, one cannot own a future thing but can only be the creditor of a person who will procure or manufacture a thing in the future.⁴⁹

And fourthly, in a strict sense, only real rights are susceptible of possession. Obligations and personal status are susceptible of possession in a metaphorical sense. This possession is merely an appearance of a person in the eyes of other persons as holder of a right or as entitled to a certain status. The constituent elements and the juridical consequences of this possession are different from those deriving from the possession of which real rights are susceptible, which is one of their principal attributes.⁵⁰

In contrast to personal rights, real rights include two important attributes, the right to follow and the right of preference.

It is a prerogative of the holder of a real right to exercise his right over the thing in whatever hands it may be found. The

49. See 2 CARBONNIER, *DROIT CIVIL* 35 (1957). But cf. DEMOGUE, *NOTIONS FONDAMENTALES DU DROIT PRIVÉ* 441 (1911).

50. See 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 53 (1952).

owner of a thing may thus reclaim it in the hands of any possessor. This is always so with regard to immovables; while with regard to movables the right to follow is frequently paralyzed by Article 2279, which declares that possession of a movable is equivalent to title. The holder of the right of a predial servitude may exercise it against any owner of the servient estate. But it is with regard to real security that the right to follow acquires its full practical significance and results in a tangible difference between hypothecary and ordinary creditors. The mortgagee can seize the immovable in the hands of a third purchaser and in doing so merely exercises the right to follow which is inherent in his real right. General creditors, except in case of fraud, have no standing against the purchaser of an immovable (Article 1167). In this case, the immovable no longer forms part of the debtor's patrimony and, as ordinary creditors have no right to follow, it cannot be seized. It has been suggested that this distinction is not generally valid because there are obligations which confer the right to follow. As examples are mentioned the contract of lease and the right of a creditor to claim restitution from one receiving payment under circumstances discharging his debtor of all responsibilities (Article 1240). But the prevailing view is that these examples are not well taken.⁵¹ The right of the lessee against the owner of the thing leased is a specific right accorded to him by special provision in the Code and the right of the creditor in the second example is an application of the principle of unjust enrichment. Obligations do not confer the right to follow, though it is certainly within the power of the legislature to extend to certain personal rights, without changing their nature, the type of protection ordinarily granted to real rights.

The right of preference is the prerogative which the holder of a real right has to exclude from the enjoyment of a thing all persons having only a personal right or a real right of an inferior rank. The purchaser of a thing may claim delivery in case the vendor becomes insolvent and is thus accorded preferential treatment in comparison with ordinary creditors of the bankrupt. This is so because the purchaser acquires the real right of ownership by virtue of the contract of sale. But it is again in the field of real security that the right of preference, as the right to follow, produces its most important practical

51. *Id.* at 51.

consequences. The mortgagee having a real right will be paid before other creditors having only personal rights, and, among several mortgagees, the older will be preferred over the more recent ones (*prior tempore, potior jure*). It has been observed, however, that the right of preference may exist for the benefit of an obligation and that in effect Article 2093 of the Code sanctions the rule "first in time, preferable in law."⁵²

D. Intermediary Categories

The distinction between personal and real rights has been said to be "fundamental" in French law.⁵³ The character and content of the passive obligations which real rights generate, and the power of the holder of a real right to derive economic advantages from the thing directly, suffice to establish this distinction. But differences apart, real rights and personal rights are not such "pure" concepts as to exclude the existence of several categories of rights which partake of the nature of both and therefore defy accurate classification. These rights structurally appear to be personal rights, but functionally exhibit characteristics common to real rights.

Of this nature are, in the first place, the so-called "real obligations" (*obligations réelles, obligationes propter rem*).⁵⁴ As example is given the obligation imposed by Articles 698 and 699 of the Code Civil on the owner of a servient estate to construct at his expense all the necessary works for the exercise of the servitude. This is an "obligation," as it involves a performance due to a creditor. But this obligation instead of attaching to the person of the obligor and his patrimony as a whole as all other obligations do, attaches only to a particular immovable. The debtor is not bound except as owner of the immovable and he may avoid this obligation by abandoning or alienating the immovable. In this case, the obligation will be transferred to the new owner of the immovable. Courts and writers also classify as an *obligatio propter rem* the duties owed to the mortgagee by one acquiring an immovable subject to mortgage. The acquirer of the immovable is not personally responsible for the payment of the debt, but, if the debt is not paid, he

52. *Id.* at 52 (and cases cited).

53. *Id.* at 47.

54. See 2 CARBONNIER, *DRIT CIVIL* 36-37 (1957); GINOSSAR, *DRIT RÉEL, PROPRIÉTÉ ET CRÉANCE* 89-106 (1960); BAUDRY-LACANTINERIE, *TRAITÉ THÉORIQUE ET PRATIQUE DE DROT CIVIL*, 5 SUPPLEMENT by Bonnetcase 314-436 (1930).

must suffer the consequences of foreclosure proceedings. His responsibility is limited to this immovable and derives from his ownership of the immovable.

Further, several personal rights have acquired characteristics traditionally associated with real rights. Thus, the contract of lease may be set up against the lessor's successor in title (Article 1743) and availability of the right of retention (*jus retentionis*) may result in preferential treatment of ordinary creditors. This right entitles any creditor who is in possession of a thing belonging to his debtor to keep it until the indebtedness is paid (Article 1612). Conversely, real rights are frequently interwoven with personal rights and liabilities. Abusive or abnormal exercise of the right of ownership may give birth to an obligation for the repair of the damage caused to neighbors; and lawful exercise of the right of ownership, as in the case of one claiming a thing from a *bona fide* possessor, may generate an obligation for compensation of expenses.

III. LOUISIANA

The Louisiana Civil Code has incorporated either expressly or by clear implication a number of assumptions, maxims, and doctrinal ideas which form the substratum of the civilian tradition. The distinction of rights into patrimonial and extra-patrimonial, and the division of the latter into "personal" and "real," may thus be regarded as inherent in the Code and may be formally established by reference to several articles.

A. Distinction of Personal and Real Rights

A personal right (obligation) may be defined as the legal power that a person (obligee) has to demand from another person (obligor) a performance consisting in giving, doing, or not doing a thing (Articles 1761, 1883, 3182). The Louisiana Supreme Court declared in *Reagan v. Murphy* that "a personal right . . . defines man's relationship to man and refers merely to an obligation one owes to another which may be declared only against the obligor."⁵⁵ As in France, obligations in Louisiana ultimately result in financial responsibility of the obligor. His entire patrimony may be seized and sold in case of non-perform-

55. *Reagan v. Murphy*, 235 La. 529, 105 So.2d 210, 214 (1958), quoted verbatim in *Harwood Oil and Mining Co. v. Black*, 240 La. 641, 124 So.2d 764 (1960).

ance for the satisfaction of the obligee's claim (Articles 1968, 3182).

In Louisiana real rights are not ghosts of the legal past, but an accepted category of very important patrimonial interests. The term "real rights" is employed in the Civil Code,⁵⁶ statutory legislation,⁵⁷ the Code of Civil Procedure,⁵⁸ and in Louisiana jurisprudence.⁵⁹ Yet this term has not been legislatively defined, and, for this reason, characterization of a right as "real" may still be a controversial issue in concrete cases. Definition of real rights, and determination of their juridical nature, would obviously furnish criteria for the classification of certain controversial rights as personal or real. In turn, classification would entail practical consequences ranging from the applicability of the rules governing prescription of non-use⁶⁰ to the availability of the possessory and petitory actions⁶¹ and the effect of the right as against a particular person or against the world.

Definition of real rights, and determination of their juridical nature, has been made in a number of Louisiana cases. In *Reagan v. Murphy*⁶² and in *Harwood Oil & Mining Co. v. Black*,⁶³ two cases involving mineral leases, the Louisiana Supreme Court declared that "the term 'real right' under the civil law is synonymous with proprietary interest, both of which refer to a species of ownership. Ownership defines the relation of man to things and may, therefore, be declared against the world." Commenting on this definition, an able student observed that "the court has restricted the use of the term 'real right' to an interest in property as owner" and that "this restriction is difficult to

56. See, e.g., LA. CIVIL CODE arts. 490, 492, 1904, 3454, 3529 (1870). Cf. LA. CIVIL CODE art. 487 (1870); "There may be different kinds of rights to things: 1. A full and entire ownership. 2. A right to the mere use and enjoyment. 3. A right to certain servitudes due upon immovable estates."

57. See, e.g., LA. ACTS 1938, No. 205, *as amended*, La. Acts 1950, No. 6; LA. R.S. 9:1105 (1950).

58. See LA. CODE OF CIVIL PROCEDURE arts. 3651-56, 3658-64 (1960).

59. See, e.g., *Reagan v. Murphy*, 235 La. 529, 105 So.2d 210 (1958); *Calhoun v. Gulf Refining Co.*, 235 La. 494, 104 So.2d 547 (1958); *Munn v. Wadley*, 192 La. 874, 189 So. 561 (1939); *Vincent v. Bullock*, 192 La. 1, 187 So. 35 (1939); *Gulf Refining Co. v. Glassel*, 186 La. 190, 171 So. 846 (1936); *Frost-Johnson Lumber Co. v. Salling's Heirs*, 150 La. 756, 91 So. 207 (1922).

60. See LA. CIVIL CODE arts. 789, 3529 (1870). Cf. *Reagan v. Murphy*, 235 La. 529, 105 So.2d 210 (1958); *Munn v. Wadley*, 192 La. 874, 189 So. 561 (1939); *Vincent v. Bullock*, 192 La. 1, 187 So. 35 (1939); *Frost-Johnson Lumber Co. v. Salling's Heirs*, 150 La. 756, 91 So. 207 (1922).

61. See LA. CODE OF CIVIL PROCEDURE arts. 3651-64 (1960). Cf. *Gulf Refining Co. v. Glassel*, 186 La. 190, 171 So. 846 (1936).

62. 235 La. 529, 541, 105 So.2d 210, 214 (1958).

63. 240 La. 641, 651, 124 So.2d 764, 767 (1960).

reconcile with the use that the court has previously made of the term," *i.e.*, characterization of building restrictions and real mortgages as real rights.⁶⁴ Indeed, the use of the term "proprietary interests" may be confusing. However, the Louisiana Supreme Court apparently intended to define real rights as dismemberments of ownership. This definition accords fully with historical developments within the civilian tradition and with French doctrine and jurisprudence. According to the prevailing view in France, which has been followed in Louisiana by an unbroken line of decisions, "the rights of use, enjoyment, and disposal are said to be the three elements of property in things. They constitute the *iura in re*."⁶⁵ Within certain broad limits, these elements are susceptible of further subdivision. And in this light it appears that real mortgage and building restrictions may be regarded as dismemberments of ownership, and particularly of the right to alienate.⁶⁶

Be this as it may, there can be no simple answer to the question "which are the real rights in Louisiana?" The answer necessarily presupposes two steps of analysis: first, identification of rights generally recognized as "real"; and second, determination of other rights which function in a similar way as the generally accepted real rights. In both instances, it might be interesting to verify conceptual generalizations by the tests of functional analysis. In the following discussion the question will be dealt with separately under (1) the Civil Code and (2) the Louisiana jurisprudence and statutory legislation.

B. Real Rights: The Civil Code

There can be no doubt that the rights of *ownership, use, habitation, usufruct, predial servitudes, pledge, and real mortgage* are real rights under the Louisiana Civil Code.⁶⁷ This is the

64. Comment, *Real Rights in Louisiana*, 21 LA. L. REV. 462, 463 (1961). (1961).

65. *In re Morgan R. & S.S. Co.*, 32 La. Ann. 371, 375 (1880), quoted in *Reagan v. Murphy*, 235 La. 529, 105 So.2d 210 (1958) and *Harwood Oil and Mining Co. v. Black*, 240 La. 641, 124 So.2d 764 (1960).

66. See *Queensborough Land Co. v. Cazeaux*, 136 La. 724, 737, 67 So. 641 (1915).

67. See LA. CIVIL CODE art. 487 (1870) ("kinds of rights to things"); arts. 488-532 (ownership); arts. 533-625 (usufruct); arts. 626-45 (use and habitation); arts. 646-59, 709-822 (predial servitudes); 3133-181 (pledge); and 3278-411 (mortgage). Mortgage, usufruct, use, and servitudes have been termed "real rights" expressly. See LA. CIVIL CODE arts. 490, 3282 (1870). See also *Gibson v. Zylks*, 186 La. 1043, 173 So. 757 (1937) (usufruct a real right); *Schexnaider v. Fontenot*, 147 La. 467, 85 So. 207 (1920); *Landry v. Hawkins*, 156 So. 795

traditional enumeration — accepted as valid among civilians at the time the Louisiana Code was promulgated.⁶⁸ Scattered provisions in the Code verify the authenticity of the list: these rights, being "real," cannot exist apart from their object, may be asserted against the world, include the right of preference and the right to follow, and are susceptible of abandonment and possession. All these distinguishing features and attributes of real rights are there by virtue of provisions of substantive law.

The inclusion of the right of pledge (pawn and antichresis) in the list of real rights under the Louisiana Civil Code may seem questionable to contemporary Louisiana lawyers. Indeed, legal usage in the state tends to associate the term "real rights" with rights in immovable property. This, however, was not the usage at the time the first Louisiana Civil Code was enacted; "real rights" could exist in both movables and immovables. And, as has been shown, the right of pledge, as well as ownership, use, and usufruct, of movables have all the substantive characteristics of real rights. Restricted application of the term "real rights" to interests in immovable property is meaningful only in the framework of the Louisiana Civil Procedure: "real actions" are available only to holders of real rights in immovable property.⁶⁹

The question may arise whether the Louisiana Civil Code has established real rights other than those enumerated. French commentators elaborating on provisions with exact equivalents in the Louisiana Code have discussed the question whether the list should be augmented by the addition of *possession*, *superficies*, *emphyteusis*, and, perhaps, *predial lease*.

1. *Possession*. — The question concerning the nature of possession is an old one. In the preparatory works of the French Civil Code there were certain indications that possession was regarded as a real right.⁷⁰ The Code, however, as finally promulgated, remained silent on the question; and controversies among

(La. App. 1st Cir. 1934) (mortgage a real right). Cf. *Smith v. Johnson*, 35 La. Ann. 943 (1883).

68. See 9 OUVRES DE POTHIER, TRAITÉ DU DROIT DE DOMAINE DE PROPRIÉTÉ 101 (1861). Pothier did not list pledge and mortgage among the dismemberments of ownership. However, there can be no doubt that the redactors of the Louisiana Civil Code considered both mortgage and pledge as real rights. Article 3282 of the Civil Code declares that mortgage is "a real right" and Article 3279 declares that mortgage is a "species of pledge." Cf. 1 ORTOLAN, EXPLICATION HISTORIQUE DES INSTITUTS DE L'EMPEREUR JUSTINIEN 90 (1851).

69. See LA. CODE OF CIVIL PROCEDURE arts. 3651-64 (1960).

70. See 3 FENET, RECUEIL COMPLET DES TRAVAUX PRÉPARATOIRES DU CODE CIVIL 459-60 (1836).

French commentators on the juridical nature of possession were to be expected. Demolombe asserted that *civil possession* is a real right.⁷¹ This conclusion was based on the observation that the rights accorded to one having the civil possession of a thing do not derive from personal obligations assumed by third parties and also on the presumption of ownership that Article 2779 of the Civil Code establishes.

The controversy concerning the juridical nature of possession may be interesting from the viewpoint of legal philosophy but does not involve practical consequences in Louisiana. In any case, Article 2779 of the French Civil Code does not have an equivalent in the Louisiana Code; and Article 3434 of the Louisiana Code, which has no equivalent in the French Civil Code, declares that "possession implies a right and a fact; the right to enjoy annexed to the right of ownership, and the fact of the real detention of the thing that is in the hands of the master or of another for him." This article seems to indicate that possession, whether as factual control recognized and protected by the law or as a right to such control, should be regarded as a *sui generis* right, neither personal nor real. This view is in accord with the historical sources of the Louisiana Civil Code and with contemporary continental doctrine.⁷²

2. *Superficies*. — "Superficies" is a technical term of the Roman law referring collectively to buildings, constructions, trees, plants, crops, and generally all objects adhering to the surface of the soil.⁷³ In ancient Roman law, these objects were regarded as component parts of the ground insusceptible of separate ownership or other real rights. The owner of the ground was always owner of the superficies as well as of the sub-soil. In case of alienation of the *superficies* by the owner with reservation of the ground, the purchaser or other acquirer did not obtain ownership or a real right but only a personal right against the landowner. Later on in the development of Roman law, however, the Praetor came to the assistance of the acquirer of the superficies (superficiary) and granted him an *actio in rem utilis* and a special interdict, *causa cognita*, if the alienation of the superficies

71. See 9 DEMOLOMBE, TRAITÉ DE LA DISTINCTION DE BIENS 366 (1874-82).

72. Cf. 3 ENNECERUS-KIPP-WOLFF, SACHENRECHT 19 (1957); BALIS, LAW OF THINGS 3-7 (1955); But see 2 MAASDORP'S INSTITUTES OF SOUTH AFRICAN LAW, THE LAW OF THINGS 11 (1960) (possession termed a "real right").

73. See SOHM-MITTEIS-WENGER, INSTITUTIONEN DES RÖMISCHEN RECHTS 339 (1923); WEISS, INSTITUTIONEN DES RÖMISCHEN PRIVATRECHTS 236 (1949); 9 DEMOLOMBE, TRAITÉ DE LA DISTINCTION DES BIENS 368 (1874-82).

was made in perpetuity or for a long period of time.⁷⁴ As a result of the Praetorian protection, the right of superficies came to be regarded as a dismemberment of the right of ownership. Superficies could be transferred in part or in whole to heirs and other assigns, could be charged with servitudes and usufruct, could be partitioned, and could be acquired by acquisitive prescription.

Superficies was a firmly established institution in prerevolutionary France. The holder of the superficies or surface rights was known as *domanier* and the owner of the ground as *tréfoncier*.⁷⁵ The French Civil Code does not mention this institution by name but a number of articles seem to indicate that the institution was preserved in substance. Article 553 provides that a person other than the owner of the ground may acquire by prescription or title the ownership of all or part of a building belonging to another. Further, Article 664 indicates that apartments in the same building may belong to different owners. And Article 519 declares that wind mills and water mills erected on piles in navigable and floatable rivers are immovable by nature, although the bed of these rivers is a part of the public domain. Thus, superficies is regarded in France as a veritable real right and proprietary interest, corporeal, and immovable by its nature under Article 518 of the Code. It is an estate susceptible of alienation, mortgage, usufruct, servitude, and seizure according to the rules governing immovable property. Further, superficies is susceptible of acquisitive prescription and may be protected by the petitory and possessory actions. In spite of its similarity to ownership, use, usufruct and servitudes, superficies is regarded as a distinct real right. The respective rights of the owner of the ground and the superficiary are determined by reference to contractual provisions and the code articles governing servitudes and usufruct, applied by analogy.⁷⁶ The fact that the French Civil Code has not included provisions regulating the institution of superficies by detailed provisions has been regretted in France.⁷⁷ In Belgium, the deficiency of the Code Napoleon was corrected by legislation in 1824. The Law of January 16, 1824,

74. See D.43.18.1.3

75. See 9 DEMOLOMBE, *TRAITÉ DE LA DISTINCTION DES BIENS* 370 (1874-82).

76. *Cf.* Cass., March 6, 1861, D.61.1.418; Nov. 5, 1866, D.67.1.32, S.66.1.411; April 27, 1891, D.92.1.219, S.91.1.369; Nov. 7, 1860, D.60.1.486; Besançon, Dec. 12, 1864, D.65.2.1, S.65.2.197; 3 PLANIOL ET RIPIERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 324-28 (1952).

77. See 9 DEMOLOMBE, *TRAITÉ DE LA DISTINCTION DES BIENS* 372 (1874-82).

regulated with considerable detail the rights of superficies and emphyteusis. According to Article 4 of this statute the right of superficies cannot be established for a period exceeding fifty years, but can be extended by agreement after the lapse of fifty years.⁷⁸

In Louisiana, the right of superficies should be regarded as established by the Civil Code. Article 664 of the French Civil Code has no equivalent in the Louisiana Code. But Article 506 of the Louisiana Code reproduces verbatim Article 553 of the French Code and declares that "all the constructions, plantations and works, made on or within the soil, are supposed to be done by the owner, and at his expense and to belong to him, unless the contrary be proved, without prejudice to the rights of third persons, who have acquired or may acquire by prescription the property of a subterraneous piece of ground under the building of another, or any part of the building." Further, Article 464 of the Louisiana Civil Code declares that "land and buildings or other constructions, whether they have their foundation in the soil or not, are immovable by nature." This provision is sufficiently broad to include the rule of Article 519 of the French Code which is nothing else but a specific application thereof. The legislative history of Article 464 sustains this view beyond the shade of a doubt. In the 1808 Code, Article 15, p. 96, provided that "land and buildings are immoveable by nature" and the following Article 16 in the same page declared that "wind mills and water mills fixed upon posts, and being part of the building are likewise immoveable, by their nature." This last article, reproducing in essence the text of Article 519 of the French Code, was suppressed in the revision of 1825 on the recommendation of the redactors as "useless," since it was "included in the general provision contained in the preceding article."⁷⁹ This "general provision" is that one contained in Article 15, p. 96, of the 1808 Code, which as amended in 1825, was carried in the 1870 Code as Article 464. A comment by the redactors to the 1825 amendment stated that "the alienation which a proprietor makes of the land, carries with it the buildings erected thereon, whether these buildings have a foundation in the land or not, *unless there be an express reservation to the contrary*. This is what we wished to

78. See DEKKERS, PRÉCIS DE DROIT CIVIL BELGE 799 (1954-55). Cf. GERMAN CIVIL CODE arts. 1012-17.

79. See 1 LOUISIANA LEGAL ARCHIVES, COMPILED EDITION OF THE CIVIL CODES OF LOUISIANA 37 (1937).

establish by the addition which we have made to this article." (Emphasis added.)⁸⁰

The omission from the Louisiana Civil Code of an article corresponding to Article 664 of the French Code could be taken as an indication of legislative policy against the recognition of ownership in individual apartments, and, perhaps, of superficiary rights in general. Yet, this conclusion would be in irreconcilable conflict with Articles 506 and 464 of the Civil Code and with the comment of the redactors of the 1825 Code which states clearly that one may, by express reservation, alienate the ground and retain the superficies. And if one can do this there is no reason why one should not be permitted to retain the ground and alienate the superficies. Further, Article 506 states that one may prove that he owns the superficies and that third persons may acquire by prescription "the ground under the building of another, or any part of the building." Thus, the omission of an article corresponding to Article 464 of the French Civil Code should be regarded as unintentional. Silence cannot be interpreted, and in any case, more weight should be given to provisions enacted in the Code than to possible interpretations of an omission.

Louisiana courts in the past, stressing the classification of buildings in the Code as immovables by nature, and apparently proceeding on the traditional Romanist assumption that ownership of immovables is not susceptible of horizontal division, held that buildings were insusceptible of separate ownership or other real rights distinct from those existing in the ground.⁸¹ Thus a sale of a house apart from the grounds on which it was situated was declared invalid.⁸² Gradually, however, the issue of immovability was divorced from the question of ownership and the traditional assumption of horizontal indivisibility became forgotten; and it became settled in Louisiana that one may *own* a building erected on the land of another.⁸³ Cases indicate that

80. *Ibid.*

81. See Yiannopoulos, *Movables and Immovables in Louisiana and Comparative Law*, 22 LA. L. REV. 517, 523 (1962).

82. See *Boyle v. Swanson*, 6 La. Ann. 263 (1851).

83. See *Buchler v. Fourroux*, 193 La. 445, 190 So. 640 (1939); *Lange v. Baranco*, 32 La. Ann. 697 (1880); *Keary v. Ducote*, 23 La. Ann. 196 (1871); *Davis-Wood Lumber Co. v. Insurance Co. of North America*, 154 So. 760 (La. App. 1st Cir. 1934); *Scardino v. Maggio*, 15 La. App. 444, 131 So. 217 (1st Cir. 1931); *Dougherty v. Yazoo & M.V. Ry.*, 9 La. App. 295, 119 So. 543 (1st Cir. 1928) (a barn on leased premises owned by tenant); *Di Crispino v. Bares*, 5 Orl. App. 69, 71 (La. App. 1908) ("In no sense can this house owned

this separate ownership of buildings may derive from lease, which in order to affect interests of third parties must be recorded,⁸⁴ and also from express reservation in case of transfer of title to the land.⁸⁵ Presumably, the same result could be obtained by the separate sale of buildings. Whether similar rights may be acquired by acquisitive prescription is at best questionable, in spite of the declaration of Article 506.⁸⁶ But it is certain that horizontal division of lands and buildings in Louisiana cannot be affected by judicial partition in kind. This was the narrow holding of *Lasyone v. Emerson*,⁸⁷ a case decided by the Louisiana Supreme Court in 1952.

The decisions which recognized separate ownership in buildings in effect re-introduced the concept of superficies in Louisiana law. The superficiary rights are akin to full ownership and Louisiana courts are, perhaps, justified to use the word "ownership."⁸⁸ Use of the word "superficies" may be preferable, however, for purposes of accurate analysis. The word "ownership" could be reserved to designate complete or perfect ownership including both title to lands and title to buildings. Superficiary rights fall short of complete ownership in that they are frequently limited by contractual provisions and are due to terminate upon expiration of the term for which they are granted.⁸⁹

3. *Emphyteusis*. — Emphyteusis was an institution of Greek law⁹⁰ borrowed by Roman law. It was a contract according to which one delivered to another a piece of land either in perpetuity or for a long period of time, the recipient undertaking the obligation to cultivate the land and to pay an annual rent.⁹¹ Originally, the right of emphyteusis could be established only in lands belonging to the Roman people, municipalities, and other

by one person and built on the land of another, be deemed inseparable from the land, from the standpoint of either fact or law.")

84. See *Louisiana Land & Pecan Co. v. Gulf Lumber Co.*, 134 La. 784, 64 So. 713 (1914); *Vaughn v. Kemp*, 4 La. App. 682 (2d Cir. 1926).

85. Cf. *Prevot v. Courtney*, 241 La. 313, 129 So.2d 1 (1961); *Green v. Small*, 227 La. 401, 79 So.2d 497 (1955); *Smith v. Bell*, 224 La. 1, 68 So.2d 737 (1953); *Bacque v. Darby*, 69 So.2d 145 (La. App. 1st Cir. 1954) (dicta).

86. Cf. text following note 78 *supra*.

87. 220 La. 951, 57 So.2d 906 (1952). Cf. text at note 120 *infra*.

88. See notes 83-84 *supra*.

89. Cf. LA. CIVIL CODE arts. 490, 2726 (1870).

90. Emphyteusis derives from the Greek verb, which means to plant or to cultivate.

91. See SOHM-MITTEIS-WENGER, INSTITUTIONEN DES RÖMISCHEN RECHTS 335 (1923); WEISS, INSTITUTIONEN DES RÖMISCHEN PRIVATRECHTS 238 (1949); 1 HUVELIN, COURS ÉLÉMENTAIRE DE DROIT ROMAIN 588 (1927); 9 DEMOLOMBE, TRAITÉ DE LA DISTINCTION DES BIENS 373 (1874-82).

public corporations (*agri vertigales*) but, later on, lands belonging to the Emperor and also lands owned by private individuals became susceptible of emphyteusis (*agri emphyteutarii*).

The juridical nature of the right of emphyteusis in Roman law was not clear, as it included characteristics of both real and personal rights. The recipient of the land, the *emphyteuta*, was under obligation to pay to the landowner an annual rent, the *emphyteutic canon*, which seemed to indicate that ownership remained in the landowner, and that the contract was similar to a predial lease. On the other hand, the *emphyteuta* acquired a real right in the land, since he could exercise the possessory and petitory actions in his name and could transfer or encumber his right by mortgage, usufruct, or servitudes. Further, the *emphyteuta* paid taxes, made all repairs at his expense, could change the substance of the thing, and had no right to demand reduction of the canon in case of reduced productivity. These features had nothing to do with a contract of lease and were more compatible with the idea of sale. But again, emphyteusis could not be regarded as an outright sale of the land: the *emphyteuta* could not transfer his right without the consent of the landowner, had no right to mines not opened, was not entitled to a treasure found in the land, and was under obligation to pay an annual rent — all these being features incompatible with the notion of ownership. Nor could emphyteusis be regarded as a usufruct: unlike a usufructuary, the *emphyteuta* was under obligation to make all repairs; and also unlike the right of usufruct, emphyteusis did not terminate with the death of the *emphyteuta*. Emphyteusis thus had characteristics of lease, usufruct, and ownership and in reality was a *sui generis* dismemberment of the right of ownership. This was at least the conclusion of Emperor Zenon: "*Jus emphyteuticarium neque conductionis, neque alienationis esse titulis addicendum, sed hoc jus tertium.*"⁹²

In medieval French law, emphyteusis was effectively combined with feudal tenures.⁹³ Both cultivated and uncultivated lands, and buildings, became susceptible of the right of emphyteusis, but difficult legal questions concerning the nature of the institution and the respective rights and duties of the parties remained unanswered. In the revolutionary period, Title 1, Article 1, of the Law of December 18/19, 1790, abolished *perpetual*

92. JUSTINIAN, CODE 4.66.1.

93. See 9 DEMOLOMBE, TRAITÉ DE LA DISTINCTION DES BIENS 376 (1874-82).

emphyteusis. According to a generally accepted view in France this rule was carried into the Code Napoleon (Article 530). A contract purporting to establish the right of emphyteusis, however, is not null and void. According to the jurisprudence of the Court of Cassation this contract transfers complete ownership in the lands, and the rent which is the consideration for the transfer is redeemable.⁹⁴ Emphyteusis for a period not exceeding 99 years was not touched by the revolutionary legislation and controversies arose in France over recognition of this institution in the Civil Code. Although the Code did not use the technical term "emphyteusis," it was argued that the institution was preserved either as a right of enjoyment under Article 543 or as a right of ownership under the same article. Further, it was argued that the institution ought to be preserved as it enabled persons cultivating the lands to obtain rights greater than those accorded by the establishment of a servitude or usufruct. This is the view which prevailed in doctrine and jurisprudence.⁹⁵ The Court of Cassation declared that "the rules concerning emphyteusis are neither altered nor modified by the Code Napoleon"⁹⁶ and that "the emphyteuta possesses as owner the immovable which is transferred to him for a certain period of time."⁹⁷ These decisions were strongly criticized by Demolombe, who advanced legal and economic arguments bolstering the conclusion that the French Civil Code did not, and should not, recognize the institution of emphyteusis, whether for a limited period of time or in perpetuity.⁹⁸ Indeed, the Court of Cassation later proved to be inconsistent with itself when it announced that "the right of ownership is not susceptible of division in time."⁹⁹

In Louisiana, emphyteusis is established and regulated by the Civil Code as "rent of lands."¹⁰⁰ The 1808 Code did not include any relevant provisions, but in the 1825 revision the redactors "thought it necessary to supply this omission" since "the contract of rent, is now pretty common among us."¹⁰¹ "Rent of lands" is

94. See Cass. Dec. 15, 1824, S.1824.1.596.

95. 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 986 (1952). Cf. Cass., April 1, 1840, S.40.1.433, 436; July 24, 1843, S.43.1.830; May 18, 1847, D.47.1.176, S.47.1.623. Today the institution of emphyteusis is regulated in France by the Law of June 25, 1902 as incorporated into the Rural Code.

96. Cass. July 18, 1832, [1832] *JOURNAL DU PALAIS*, 1293, 1296.

97. Cass. April 1, 1840, S.40.1.433, 435.

98. See 9 DEMOLOMBE, *TRAITÉ DE LA DISTINCTION DES BIENS* 382-92 (1874-82).

99. Cass. July 8, 1851, D.51.1.198, 199, S.51.1.628, 683.

100. See LA. CIVIL CODE arts. 2779-92 (1870).

101. See 1 LOUISIANA LEGAL ARCHIVES, COMPILED EDITION OF THE CIVIL CODES OF LOUISIANA 326 (1937).

defined as "a contract by which one of the parties conveys and cedes to the other a tract [tract] of land, or any other immovable property, and stipulates that the latter shall hold it as owner, but reserving to the former an annual rent of a certain sum of money, or of a certain quantity of fruits, which the other party binds himself to pay him" (Article 2779). The contract must be made in perpetuity; if made for a limited time only, it is classified as a lease (Article 2780). The contract is said to partake of the nature of both sale and lease (Article 2780) and, in principle, is governed by the same rules governing sale unless otherwise provided for in the Code (Article 2783). By special provision it is indicated that the contract, unlike a sale, does not convey complete ownership: the purchaser "is bound to preserve the thing in good condition that it may continue capable of producing herewith to pay the rent" (Article 2784). In case of partial loss of the thing, the rent is reducible in proportion, and in case of total loss the rent charge is extinguished (Article 2785). The rent follows the thing in the hands of any acquirer (Article 2786); but the obligation of the latter is merely real, except for arrears accrued while he was in possession of the thing (Article 2787). The rent charge is redeemable despite stipulations to the contrary, which may exclude redemption only for a period not exceeding thirty years (Article 2788). The rentor has a right of mortgage on the property and can seize it for rent due in excess of a year (Article 2791). The rent charge is susceptible of mortgage, except where it has been established gratuitously for the benefit of a third person on the condition that it should not be subject to seizure (Article 2792). These provisions indicate that "rent of lands" or emphyteusis is clearly a real right in Louisiana, when established in perpetuity. When established for a limited period of time, it is clearly a contract of lease under the Code and its nature as a real or personal right will depend on the answer to the question whether a predial lease is a real or personal right under the Louisiana Civil Code.¹⁰² Although temporary emphyteusis is not recognized in the Louisiana Civil Code, the jurisprudence developed a doctrine which in effect introduced into Louisiana law a *species* of temporary emphyteusis. In *Porche v. Bodin*¹⁰³ the Louisiana Supreme Court indicated that the lessee of an immovable is the *owner* of standing crops, in spite of the broad declaration of Article 465 of the Civil Code

102. See text at notes 105-112 *infra*.

103. 28 La. Ann. 761 (1876).

that growing crops are component parts of the land.¹⁰⁴ Thus, for all practical purposes, a lessee cultivating the ground possesses a real right in the crops which is termed "ownership" but clearly approximates emphyteusis. In these circumstances, standing crops are classified as movables, and, therefore, the interest of the lessee should be regarded as a real right in corporeal movable property.

4. *Predial Lease*. — Traditionally, the contract of lease has been regarded by civilian writers as establishing only personal rights. This was the prevailing view in France even after the promulgation of the Civil Code, until Troplong advanced the view that the contract of lease generated a real right.¹⁰⁵ This view was based on Article 1743 of the French Civil Code which declares that "if the lessor sells the leased thing, the acquirer cannot evict the farmer or lessee, unless this right is reserved in the contract of lease." According to Troplong this effect of the contract of lease could be explained only on one of two grounds: either the purchaser assumes an obligation vis-a-vis the lessee (which is not the case), or the right of the lessee is a real right and can be asserted against the world. Doctrine and jurisprudence, however, as a whole, continued to maintain the view that the contract of lease does not create real rights. Article 1709 of the Civil Code defines lease as "a contract whereby one of the parties undertakes the obligation to furnish to the other the enjoyment of a thing for a certain period of time, in consideration of a certain price which the latter promises to pay him." This definition has been taken almost verbatim from Pothier who did not entertain any doubts as to the personal nature of the contract of lease.¹⁰⁶ Further, it has been stated that the contract of lease produces all the effects of personal rights and none of the effects of real rights. The lessee cannot abandon the thing, nor can he bring an action against third possessors (Article 1727); the lessee may demand the delivery of the thing from the lessor (Article 1719), is entitled to reduction of rent in case of loss of fruits without his fault (Articles 1769, 1770), and avoids all responsibility in case of total loss of the thing due to fortuitous events (Article 1722). In this light, it is difficult to see how

104. See Yiannopoulos, *Movables and Immovables in Louisiana and Comparative Law*, 22 LA. L. REV. 517, 520 (1962).

105. See 1 TROPLONG, *DE L'ÉCHANGE ET DU LOUAGE* 60 (1859). Cf. note 25 *supra*.

106. See 4 *OEUVRES DE POTHIER, TRAITÉ DU CONTRAT DE LOUAGE* 2 (1861). Cf. 9 DEMOLOMBE, *TRAITÉ DE LA DISTINCTION DES BIENS* 395 (1874-82).

Article 1743 could upset the scheme of the Code. This article merely determines that the acquirer of a thing leased succeeds to the personal obligations contracted between lessor and lessee, assumes the position of the lessor, and is subrogated to his rights and duties. This is a legal obligation imposed for reasons of social and economic utility. Even at the time Pothier wrote, a successor to a thing leased could not evict the tenant before termination of the cultivation period. This rule was grounded on "charity and equity."¹⁰⁷

The provisions of the Louisiana Civil Code governing lease are almost identical in substance with those of the French Code. These provisions indicate that the contract of lease generates personal rights though, by operation of law, one acquiring a thing leased is subrogated to the rights and duties of the former owner. Yet, Article 2015 of the Civil Code, which has no equivalent in the French Code, declares that leases "form real obligations." This could be taken to mean that the contract of lease creates real rights as correlative to the real obligations of Article 2015. Louisiana courts, however, have in recent years consistently classified leases as involving rights *ad rem* rather than *in re*.¹⁰⁸ This classification applies to all predial leases whether made for a short or a long period of time¹⁰⁹ and whether recorded or not. Recordation may enable the lessee to assert his rights against third persons but does not alter the nature of those rights. The right of the lessee is always a personal right against the landowner to let him enjoy the thing; and if the landowner does not perform his obligation, the lessee's remedy is an action for damages. The predial lessee has no standing to bring the petitory

107. See 4 OEUVRES DE POTHIER, TRAITÉ DU CONTRAT DE LOUAGE 105 (1861).

108. See *Harwood Oil and Mining Co. v. Black*, 240 La. 641, 124 So.2d 764 (1960); *Reagan v. Murphy*, 235 La. 529, 105 So.2d 210 (1958); *Calhoun v. Gulf Refining Co.*, 235 La. 494, 104 So.2d 547 (1958); *Gulf Refining Co. v. Glassel*, 186 La. 190, 171 So. 846 (1936). *Cf. In re Morgan R.R. & S.S. Co.*, 32 La. Ann. 371 (1880). *But cf. Ernest A. Carrere's Sons v. Levy*, 191 So. 747 (La. App. 1939); *Coyle v. Geoghegan*, 187 La. 308, 174 So. 366 (1937) (predial lease is a real obligation); *Manteris Co. v. Baton Rouge Poster Advertising Co.*, 12 La. App. 162, 125 So. 293 (1929) (real obligation, real right); *Canal & Claiborne R.R. v. Orleans R.R.*, 44 La. Ann. 54, 10 So. 389 (1892) (real obligation, servitude); *Burke v. Wall*, 29 La. Ann. 38 (1877) (real obligation).

109. See Comment, *Long-Term Leases Affecting Minerals*, 8 LA. L. REV. 540 (1948). The Louisiana Civil Code does not specifically regulate the long-term lease. Article 2684 provides that "the duration and the conditions of leases are generally regulated by contract, or by mutual consent," but Article 2474 requires that leases be granted "during a certain time." Corresponding provisions in the French Civil Code have been interpreted to limit the maximum duration of a lease to ninety-nine years. See 10 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 574 (1856).

or possessory action.¹¹⁰ But it remains to be seen whether the "ownership"¹¹¹ which lessees may have in immovables on leased ground is a right that can be asserted against the world in the lessee's own name and whether such a lessee may avail himself of the real actions.¹¹² So far, decisions recognizing this "ownership" merely involved contests between persons acquiring title to the land, and claiming improvements on the premises by virtue of their title, and lessees asserting their own rights to the improvements according to the provisions of their lease.

5. *Party Autonomy.*—Question has arisen in Louisiana as to whether the real rights established in the Code may be altered and modified by contract, and whether the parties to a contract may create real rights not regulated by the Code. There is no specific declaration of legislative policy in the Code, except, as in France, an obvious balance between the policy favoring contractual freedom and social interests embodied in the notion of public policy.¹¹³ In France, we have seen, doctrine and jurisprudence are settled that the parties to a contract may in their exercise of contractual freedom modify existing real rights or create new ones within certain limits.¹¹⁴ Article 487 of the Louisiana Civil Code, corresponding to Article 543 of the French Code, declares that "there may be different kinds of rights to things: 1. A full and entire ownership. 2. A right to the mere use and enjoyment. 3. A right to certain servitudes due upon immovable estates." This article could be interpreted as listing *all* the permissible dismemberments of ownership in Louisiana. But, under the influence of French jurisprudence and doctrine, Louisiana courts have treated this article as merely illustrative.¹¹⁵ In

110. See LA. CODE OF CIVIL PROCEDURE art. 3656 (1960). In contrast to the predial lessee, the mineral lessee "is the owner of a real right"; accordingly, he has a standing to bring the petitory and possessory actions. *Id.* art. 3664.

111. See text at note 83 *supra*.

112. *Cf.* LA. CODE OF CIVIL PROCEDURE arts. 3651-3664 (1960).

113. See text at notes 31-32 *supra*; *Queensborough Land Co. v. Cazeaux*, 136 La. 724, 728, 67 So. 641, 643 (1915): "[W]hile the public policy of the state opposes the putting of property out of commerce, it at the same time favors the fullest liberty of contract (article 1764, C.C.), and the widest latitude possible in the right to dispose of one's property as one lists (article 491, C.C.) so long as no disposition is sought to be made contrary to good morals, public order, or express law."

114. *Cf.* text at notes 32-33 *supra*; *Queensborough v. Cazeaux*, 136 La. 724, 729, 67 So. 641, 643 (1915) ("In France . . . public policy in this regard, as indeed, in the case of every enlightened nation, is the same as ours").

115. *Cf.* *Queensborough Land Co. v. Cazeaux*, 136 La. 724, 67 So. 641 (1915): the enumeration of real rights in Article 487 of the Civil Code is, indeed, incomplete. This enumeration refers only to the so-called *principal* real rights. *Cf.* 9 DEMOLOMBE, *TRAITÉ DE LA DISTINCTION DES BIENS* 356 (1874-82) (elaborating on Article 543 of the French Civil Code which corresponds to Article 487 of the

Queensborough Land Co. v. Cazeau,¹¹⁶ which involved the validity of a restriction on alienation, the Louisiana Supreme Court quoted extensively from Toullier and other French commentators and adopted the view that, in principle, the parties to a contract may create real rights "apart and beyond" those created in the Civil Code, subject to a close judicial scrutiny in the general interest of the public. As in France, however, and perhaps for the same reasons, little use of this facility has been made in practice. Perhaps the most important examples of real rights created by the exercise of contractual freedom are mineral servitudes, mineral royalties and building restrictions discussed in detail in another part of this study.¹¹⁷

Louisiana Code); thus mortgage and pledge, *accessory* real rights, are not mentioned. The question whether accessory real rights are or are not dismemberments of ownership is a controversial issue. See 9 DEMOLOMBE, *TRAITÉ DE LA DISTINCTION DES BIENS* 353-56 (1874-82); GINOSSAR, *DROIT RÉEL, PROPRIÉTÉ ET CRÉANCE* 148 (1960). Cf. *Shaw v. Watson*, 151 La. 893, 92 So. 375 (1922) (real mortgage not a dismemberment of ownership: dicta).

116. 136 La. 724, 736, 67 So. 641, 645 (1915). This case furnishes the backbone of Louisiana doctrine: "As stated by article 491 of the Code, ownership is composed of the rights to use, to enjoy, and to dispose of. These three constituent elements of the ownership bear in the civil law the designation given to them in the Roman law: The *usus*, the *fructus*, and *abusus*. The two first of these elements the use and the usufruct, are admittedly susceptible of separation from the other elements and of subdivision after having been segregated; why then is not the third, the *abusus*, or right to dispose of, susceptible of being dealt with in like manner? . . . The right to alienate is but one of the constituent elements of the right to dispose of . . . so may this right to alienate, a subdivision of the *abusus*, be, in turn, subdivided. . . ."

117. See text at notes 141-49, 173-204, 234-57 *infra*: in general, the attitude of the Louisiana courts has been cautious. It has been said that "the modifications of the right of property under our laws are few and easily understood, and answer all the purposes of reasonable use. It is incumbent on courts to maintain them in their simplicity." *Harper v. Stanbrough*, 2 La. Ann. 377, 382 (1847); Ownership may be dismembered (*i.e.*, real rights may be created) only within certain broad limits prescribed by the Code and the notion of public policy. See *Queensborough Land Co. v. Cazeaux*, 136 La. 724, 67 So. 641 (1915). The law does not open "the door to an unregulated brood of real rights." *Louisiana & A. Ry. v. Winn Parish Lumber Co.*, 131 La. 288, 59 So. 403, 426 (1911). Thus, perpetual restrictions on alienation are invalid. *Female Orphan Society v. Young Men's Christian Ass'n*, 119 La. 278, 44 So. 15 (1907). Creation of servitudes to do, *in faciendo*, is likewise illegal. *Louisiana & A. Ry. v. Winn Parish Lumber Co.*, *supra*. Actually, all modifications of the right of ownership recognized as valid by Louisiana courts, with the exception of mineral servitudes and possibly of building restrictions, fall within the categories of predial servitudes and usufruct. Building restrictions today are classified as a species of predial servitudes. See text at notes 244-47, 255, *infra*. Mineral servitudes are *sui generis* species of real rights: they are servitudes in favor of a person and *his heirs*. *Frost-Johnson Lumber Co. v. Salling's Heirs*, 150 La. 756, 864, 91 So. 207, 245 (1922); in this case the Louisiana Supreme Court declared: "The right to establish a servitude in favor of a person and *his heirs* seems to be forbidden by C.C. arts. 646, 709. But, on the other hand, it seems to be allowed by C.C. arts. 607, 758, 2013. And with these conflicting provisions before us we cannot say that the law clearly prohibits the creation of a servitude upon lands in favor of a person and *his heirs*. And hence, the intention of the parties should govern in such matters." This

C. Real Rights: Jurisprudence and Statutory Legislation

Louisiana courts have at various times classified a number of rights as "real."¹¹⁸ However, it would be misleading to rely on isolated cases and produce a list of rights classified as "real" merely because the term "real" was used. Perhaps, a better test would be functional analysis and determination of rights which produce results ordinarily attributed to established real rights. The traditional list of real rights does not involve problems. Though not always termed "real rights," there is ample evidence that the rights of ownership, use, habitation, usufruct, servitudes, pledge (pawn and antichresis), real mortgage, and emphyteusis function as real rights. The rights of ownership, use, and usufruct are real rights whether concerning movable or immovable property. Pawn can obviously exist only in movables; real mortgage, antichresis, habitation, servitudes, and emphyteusis can exist only in immovables. Apart from these rights established in the Civil Code, jurisprudence and legislation in Louisiana have created additional real rights which need be considered separately.

1. *Ownership of Individual Apartments.*—Recognition of superfiary rights by the Louisiana Supreme Court in recent years¹¹⁹ has never been carried by the courts to its logical conclusion, viz., the recognition of ownership in individual apartments. In *Lasyone v. Emerson*,¹²⁰ it was held that buildings were not susceptible of judicial partition in horizontal planes and dicta in the same case indicated that horizontal division by voluntary acts of the owner or co-owners holding undivided interests was likewise excluded. Horizontal division of buildings, however, and ownership of individual apartments conform fully with the precepts of the Civil Code and are not contrary to contemporary civilian notions.¹²¹ Further, experience in other civil law juris-

faculty, however, does not seem to have been exercised in Louisiana apart from the fields of mineral servitudes and building restrictions.

118. *Cf. Lighting Fixture Supply Co. v. Pacific Fire Ins. Co.*, 176 La. 499, 146 So. 35 (1933) (lessee's right to the use and enjoyment of improvements placed by him on the leased premises "an immovable right"); *Kingberger v. Droute*, 149 La. 986, 90 So. 367 (1922) (recorded option to purchase an immovable); *Lehman v. Rice*, 118 La. 975, 43 So. 639 (1907) (recorded option to purchase an immovable); text at notes 360-65, *infra*; *Succession of Gamble*, 23 La. Ann. 9 (1871) (right to use pews in a church).

119. *Cf. text at notes 83-86 supra.*

120. 220 La. 951, 57 So. 2d 906 (1952). *Cf. note 87 supra.*

121. *Cf. text at notes 79-81, supra.*

dictions¹²² and common law sister states¹²³ has confirmed the usefulness of such a regime. It is not surprising, therefore, that the Louisiana legislature passed in its 1962 session the "Horizontal Property Act"¹²⁴ as a piece of emergency legislation designed to cope with contemporary needs and economic developments.¹²⁵

The act enables the "owner or the co-owners of a building" to submit "their property to . . . a horizontal property regime."¹²⁶ Under this regime, an apartment "may be individually conveyed and encumbered and may be the subject of ownership, possession or sale and of all types of juridic acts inter vivos or mortis causa, as if it were sole and entirely independent of other apartments in the building of which it forms a part, and the corresponding individual titles and interests shall be recordable."¹²⁷ "Apartment" has been defined as "an enclosed space consisting of one or more rooms occupying all or part of a floor in a building of one or more floors or stories regardless of whether it be designated for residence, for office, for the operation of any industry or business, or for any other type of independent use, provided that it has a direct exit to a thoroughfare or to a given common space leading to a thoroughfare."¹²⁸

The act also provides that "any apartment may be held and owned by more than one person as joint tenants, as tenants in common, as tenants by the entirety or in any other real estate tenancy relationship recognized under the law of this State."¹²⁹

122. With respect to the ownership of individual apartments, see German Law of March 15, 1951; Greek Civil Code art. 1002; 3 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 262 (1952).

123. See Comment, *Individual Ownership of Apartments in Louisiana*, 19 LA. L. REV. 668 (1959).

124. La. Acts 1962, No. 494, § 1. Its complete title is "an Act to provide for the Creation of Horizontal Property Regimes and Regulation therefor." The act shows poor draftmanship. Cf. text at notes 129-30 *infra*. It is regrettable that such an important piece of civil law legislation was enacted without the expert assistance of the Louisiana State Law Institute. Expert drafting might have avoided a number of latent conflicts between the act and Civil Code.

125. See La. Acts 1962, No. 494, § 24: "[T]here is an urgent need to make available housing and business location to those persons in the State who live in areas where land costs make it impossible for them to acquire single family homes or single unit business location and where current rentals are beyond their economic reach; . . . construction and development of housing and business location for such persons cannot be undertaken by private industry for lack of legislation enabling single units in multi-unit structures to qualify for federally insured loans. . . . Therefore, an emergency is declared to exist."

126. La. Acts 1962, No. 494, § 3.

127. *Id.* § 4.

128. *Id.* § 2(a). The definition of "apartment" is sufficiently broad to include a single one story unit. Yet, other provisions in the act contemplate structures of at least two units and, perhaps, of at least two stories.

129. La. Acts 1962, No. 494, § 5.

This provision may be interpreted as introducing into Louisiana property law *common law tenures* heretofore unknown in the state. Such an interpretation might prompt the courts to declare the provision unconstitutional under Article III, Sections 16 and 18, of the Louisiana Constitution.¹³⁰ The constitutionality of the provision could be upheld either by disregarding the common law terms or by substituting in their place civilian concepts. The provision then could be interpreted as permitting *co-ownership* of individual apartments and the creation of *real rights* recognized under the law of the state. This construction avoids the objection of unconstitutionality but renders the legislative declaration superfluous.

The act is of a limited scope. It merely renders possible and regulates ownership of individual apartments subjected to the regime of "horizontal property"¹³¹ by voluntary acts of the owner or co-owners after a building has been erected.¹³² The general question of horizontal divisibility of land ownership¹³³ and attendant legal problems have not been touched upon. Thus, the act does not affect the regime of buildings erected on the land of another.¹³⁴ Nor does it disturb the narrow holding of *Lasyone v. Emerson*¹³⁵ so that, as in the past, judicial partition in kind is not a remedy available to co-owners holding undivided interests in buildings. Finally, words not defined in the act, like the word

130. See LA. CONST. art. III, § 16 (1921): "Every statute enacted by the Legislature shall embrace but one object, and shall have a title indicative of its object." *Id.* art. III, § 18: "The legislature shall never adopt any system or code of laws by general reference to such system or code of laws; but in all cases shall recite at length the several provisions of the laws it may enact." As stated in the title, the purpose of the act is to provide for horizontal property regimes and regulations therefor. There is no language in the title indicating that the act was intended to introduce common law tenures. Thus, the body of the act, insofar as it permits common law tenures is broader than its title. *Cf.* *Buchler v. Fourroux*, 193 La. 445, 190 So. 640 (1939). From the viewpoint of legislative policy, there seems to be no valid argument supporting the introduction of common law tenures into Louisiana law. Nor can such legislation be justified by reference to pressing social and economic needs.

131. The act regulates the ownership and use of the common elements (§§ 6-7) and establishes the indivisibility of these elements (§ 8). Further, the act regulates the recordation and contents of the master deed (§§ 9-11), waiver and re-establishment of the regime (§§ 12-13), adoption and content of by-laws (§§ 14-15), expenses of administration and contributions therefor (§§ 16-17), priority of liens (§ 18), liabilities of the purchaser and seller (§ 19), insurance of buildings and allocation of the proceeds (§§ 20-21), and separate taxation (§ 22).

132. See La. Acts 1962, No. 494, § 3. Language in this section seems to indicate (*a contrario*) that the regime cannot be established before a building is erected or by judicial partition in kind.

133. *Cf.* *White v. Frank B. Treat & Son*, 230 La. 1017, 89 So. 2d 883 (1956) (horizontal indivisibility of mineral servitudes).

134. *Cf.* text at notes 81-86 *supra*.

135. 220 La. 951, 57 So. 2d 906 (1952).

"buildings," will be interpreted according to their settled meaning under the Civil Code and the Louisiana jurisprudence.¹³⁶

The owner of an individual apartment is the holder of a right in an immovable. This right is full and complete ownership. At the same time, the owner of an individual apartment holds an undivided interest in the "general common elements"¹³⁷ and may also hold an undivided interest in the "limited common elements."¹³⁸ These interests are rights of co-ownership. Both ownership and co-ownership of immovables are by definition "real rights" in Louisiana.

2. *Mineral Rights: Servitudes, Leases, and Royalties.* — The branch of Louisiana law governing mineral rights has been predominantly the product of a creative jurisprudence.¹³⁹ The discovery and production of oil and gas in the state compelled Louisiana courts to adapt the precepts of the Civil Code to new developments and to supplement them by the enunciation of rules applicable to the various "mineral rights." The Louisiana legislature failed to adopt an all-inclusive mineral code and limited itself to piecemeal corrective legislation in connection with particular issues. Mineral rights in Louisiana may take various forms and may issue from various transactions, such as "sale," "reservation," or "lease."¹⁴⁰ Sale or reservation of the right to search for minerals and reduce them to possession is said to establish a "mineral servitude," while the mineral lease is classified as a "personal right." The right to share in the proceeds of production ("royalty") is said to be a *sui generis* real right distinguishable from both servitude and lease. These terms will be discussed separately.

Quite frequently, landowners "sell" the minerals and reserve title to the land or "reserve" the minerals and transfer title to the land. At the incipient stage of development of the oil and gas industries in Louisiana, these transactions were thought of as "translative" of ownership rights and as creative of a distinct mineral estate.¹⁴¹ Indeed, the Louisiana Supreme Court follow-

136. See Yiannopoulos, *Movables and Immovables in Louisiana and Comparative Law*, 22 LA. L. REV. 517, 522 (1962).

137. See La. Acts 1962, No. 494, § 2(a).

138. *Id.* § 2(e).

139. See DAGGETT, *MINERAL RIGHTS IN LOUISIANA, Introduction* (1949).

140. See *Wemple v. Nabors Oil & Gas Co.*, 154 La. 483, 97 So. 666 (1923) (sale); *Frost-Johnson Lumber Co. v. Salling's Heirs*, 150 La. 756, 91 So. 207 (1922) (reservation); *Logan v. State Gravel Co.*, 158 La. 105, 103 So. 526 (1925) (lease).

141. See *DeMoss v. Sample*, 143 La. 243, 248, 78 So. 482, 484 (1918) ("The

ing common law authorities had indicated that land ownership was susceptible of horizontal division and that minerals might be "owned" in place.¹⁴² But in the landmark case of *Frost-Johnson Lumber Co. v. Salling's Heirs*,¹⁴³ the Supreme Court declared emphatically that "oil and gas in place are not subject to absolute ownership as specific things apart from the soil of which they form part" and that sale or reservation gives merely the right to search for and reduce to possession all minerals found. While it is apparent that this decision was prompted by policy considerations, the court stressed technical reasoning. A landowner, the court said, "cannot convey or reserve the ownership of the oils, gases, and waters therein apart from the land in which they lie . . . because the owner himself has no absolute property in such oil, gases, and waters, but only the right to draw them through the soil and thereby become the owner of them. . . the principle being that no one can convey to ownership doctrine was based on the assumption that oil and gas were fugacious minerals which, like other fugacious things, could be owned only after reduced to possession."¹⁴⁴

It has been argued that this assumption does not conform with geological data.¹⁴⁵ However, doubts as to the validity of technical reasoning should be divorced from the consideration of policy grounds. Little argument can be made against the position of the court that minerals are a component part of the ground and cannot be conveyed separately from the ground; this is in conformity with both civilian notions and policy considerations relating to the preservation of simplicity of land tenures. Thus, assuming that the landowner *owns* the minerals, still dismemberment of his ownership could be precluded on policy grounds. If the Louisiana Supreme Court insisted on the non-ownership theory, this was apparently done for two reasons: to preclude attacks on the constitutionality of conser-

parties have divided the property in what might be called horizontal planes").

142. See *Calhoun v. Ardis*, 144 La. 311, 314, 80 So. 548, 549 (1919): "Whatever doubt may have existed in this state as to the right of an owner of lands, to dismember the property and vest the ownership of the surface of the soil in one person and that of the minerals . . . in another person, or retain it in himself, was definitely set at rest by the decision of this court in the case No. 21433, *De Moss v. Sample*, 143 La. 243, 78 So. 482." *But cf.* *Iberville Land Co. v. Texas Co.*, 14 La. App. 221, 128 So. 304 (1st Cir. 1930) (horizontal division of mineral property "a legal impossibility"); *Saunders v. Busch-Everett Co.*, 138 La. 1049, 71 So. 153 (1914); DAGGETT, MINERAL RIGHTS IN LOUISIANA 5 (1949).

143. 150 La. 756, 91 So. 207 (1922).

144. *Id.* at 863, 91 So. at 245.

145. *Id.* at 807-11, 91 So. at 225 (dissenting opinion of Provosty, J.).

vation statutes¹⁴⁶ and to block forever the recognition of mineral estates. If the argument of the dissenting Justices that the landowner *owned* the minerals in place were granted, then there would still be room for discussion and evaluation of the policy excluding horizontal divisibility of land ownership.

As ownership of minerals in place was excluded, characterization of the "reservation" of minerals as a personal right seemed to be the most probable alternative under the Civil Code. But this would afford little protection to landowners reserving title to minerals or to persons acquiring minerals by sale. Consequently, the court was led to the idea that reservation or sale of minerals created a real right. This should be a *new* kind of real right. It could not be a predial servitude because it was not established for the benefit of another estate (Civil Code Article 647). Nor should it be a usufruct because a usufruct is non-transferable and expires with the death of the usufructuary (Civil Code Article 606). There was room for doubt, however, whether the parties to an agreement could create real rights beyond and apart from those established in the Civil Code, and particularly "personal" servitudes. Thus, citing French authorities and after having reviewed all relevant articles of the Civil Code, the Court came to the conclusion that

"[I]n the matter of burdening his lands with some real obligation in favor of a person and his heirs, there is not the least doubt that the owner can do so unless some positive law prohibits it. Now the right to establish a servitude in favor of a person *and his heirs* seems to be forbidden by C.C. art. 646, 709. But, on the other hand, it seems to be allowed by C.C. arts. 607, 758, 2013. And with these conflicting provisions before us we cannot say that the law clearly prohibits the creation of a servitude upon lands in favor of a person *and his heirs*. And hence the intention of the parties should govern in such matters."¹⁴⁷

This mineral servitude in favor of a person and his heirs is clearly a real right in Louisiana¹⁴⁸ governed in part by the code

146. *Id.* at 836, 91 So. at 235 (dissenting opinion of O'Niell, J.).

147. *Id.* at 864, 91 So. at 245.

148. See *Munn v. Wadley*, 192 La. 874, 189 So. 561 (1939) (reservation of minerals: "a real right"); *Shaw v. Watson*, 151 La. 893, 92 So. 375 (1922) (sale of mineral rights: "a real right," "a servitude upon the land"); *Vincent v. Bullock*, 192 La. 1, 187 So. 35 (1939) (mineral royalty: "a species of a real right"); *Barthold v. Dover*, 153 So. 49 (La. App. 2d Cir. 1934), *rehearing denied*, 153 So. 724 (1934) (sale of mineral rights: "servitude"). The mineral servitude, being an

provisions applicable to predial servitudes and usufruct and in part by special legislation and jurisprudence.¹⁴⁹

A lease for the production of minerals may be granted by the landowner, or, in case a mineral servitude is established, by the holder of this right.¹⁵⁰ Mineral leases were treated for many years under various classifications.¹⁵¹ In the late twenties and early thirties, the Louisiana Supreme Court maintained the view that a mineral lease was "a personal servitude in the nature of a limited usufruct."¹⁵² But when the occasion arose, the Supreme Court announced that a mineral lease had never been defined to be a *true* usufruct because it does not attach to an immovable so as to pass with it.¹⁵³ In a number of cases, however, and for several purposes, mineral leases were treated as servitudes and as real rights.¹⁵⁴

The question concerning the legal nature of mineral leases was clarified by a landmark case, *Gulf Refining Co. v. Glassel*,¹⁵⁵ decided in 1936. In this case, the Louisiana Supreme Court repudiated all prior inconsistent cases and declared that mineral leases were personal contracts rather than servitudes, subject

incorporeal immovable, is not susceptible of being burdened by another servitude. *Long-Bell Petroleum Co. v. Tritico*, 216 La. 426, 43 So. 2d 782 (1949).

149. See DAGGETT, MINERAL RIGHTS IN LOUISIANA 19-142 (1949). Reservation of mineral rights is an incorporeal immovable governed, for conflict of laws purposes, by the *lex rei sitae*. *Munn v. Wadley*, 192 La. 874, 189 So. 561 (1939).

150. DAGGETT, MINERAL RIGHTS IN LOUISIANA 207-24 (1949).

151. See Comment, *The Louisiana Mineral Lease as a Contract Creating Real Rights*, 35 TUL. L. REV. 218, 219 (1960).

152. See *Palmer Corp. v. Moore*, 171 La. 774, 782, 132 So. 229, 231 (1931); *Frost-Johnson Lumber Co. v. Salling's Heirs*, 150 La. 756, 780, 91 So. 207, 216 (1922). See also *State ex rel. Bush v. United Gas Pub. Serv. Co.*, 185 La. 496, 169 So. 523 (1936); *Federal Land Bank v. Mulhern*, 180 La. 627, 157 So. 370 (1934); *Wiley v. Davis*, 164 La. 1090, 115 So. 280 (1928). Cf. *United Gas Public Service Co. v. Barrett*, 179 So. 506 (La. App. 2d Cir. 1938) (mineral lease: "a rent charge" and "a real obligation"); *Pan American Production Co. v. United Land Co.*, 96 F.2d 26 (5th Cir. 1938) (mineral lease: a "real obligation").

153. See *Sample v. Whitaker*, 172 La. 722, 135 So. 38 (1931); *Wilkins v. Nelson*, 155 La. 807, 99 So. 607 (1924). Cf. *Wilkins v. Nelson*, 161 La. 437, 108 So. 875 (1926).

154. See *Hamilton v. Glassel*, 57 F.2d 1032 (5th Cir. 1932). Cf. *Noble v. Plouf*, 154 La. 429, 97 So. 599 (1923) (transfer of lease subject to the rules governing sale of immovable property). See also *Arent v. Hunter*, 171 La. 1059, 133 So. 157 (1931); *Wiley v. Davis*, 164 La. 1090, 115 So. 280 (1928). Cf. *State ex rel. Bush v. United Gas Pub. Serv. Co.*, 185 La. 496, 498, 169 So. 523, 524 (1936): "The fact that an oil and gas lease is one of servitude is no longer a debatable question in this state."

155. 186 La. 190, 198, 171 So. 846, 849 (1936): "The lessee in the usual mineral and oil lease based upon cash or royalty consideration, or both, merely obtains an obligatory or personal right but not a real right — a *jus in re*." See also *Ferguson v. Britt*, 191 La. 371, 185 So. 287 (1938); *Tomlinson v. Thurmon*, 189 La. 959, 181 So. 458 (1938); *Tyson v. Spearman*, 190 La. 871, 183 So. 201 (1938); *Posey v. Fargo*, 187 La. 122, 174 So. 175 (1937).

to the code provisions governing ordinary leases. In response to this decision, the Louisiana legislature passed Act 205 of 1938, defining and classifying mineral leases as real rights.¹⁵⁶ When the act was attacked as involving a retroactive change in substantive mineral law, the Louisiana Supreme Court upheld its constitutionality on the ground that the purpose of the act was merely to give a procedural remedy.¹⁵⁷ The act was amended in 1950 to include a declaration that "it shall be considered as substantive as well as procedural."¹⁵⁸ It would seem that the purpose of the amendment was to classify mineral leases as real rights for *all* purposes. The Supreme Court, however, has indicated that this amendment did not convert mineral leases from personal contracts into real rights. The nature of the mineral leases as personal contracts remained unaffected, but these leases are considered as real rights so that lessees may benefit from the application of real property laws. As was stated emphatically in *Reagan v. Murphy*,¹⁵⁹ and quoted with approval in *Harwood Oil & Mining Co. v. Black*,¹⁶⁰ "the right of a lessee is not a real right, i.e. a *jus in re*. In other words, the lessee does not hold one of the elements of property in the thing. His right is a *jus ad rem*, a right upon the thing." But Article 3664 of the Louisiana Code of Civil Procedure declares with equal

156. La. Acts 1938, No. 205, LA. R.S. 9:1105 (1950); Hebert & Lazarus, *The Louisiana Legislation of 1938*, 1 LA. L. REV. 80, 100 (1938); Moses, *A Short History of the Development of the Statutory Definition and Classification of an Oil, Gas, and Mineral Lease as a Real Right*, 13 TUL. L. REV. 416 (1939).

157. See *Tyson v. Surf Oil Co.*, 195 La. 248, 196 So. 336 (1940). In most subsequent cases, the courts, though recognizing the lessee's rights as being "real," consistently held that Act 205 did not confer new substantive rights but was merely "remedial and procedural" in character. See *Wier v. Grubb*, 215 La. 967, 41 So. 2d 846 (1949); *Allison v. Maroun*, 193 La. 286, 190 So. 408 (1939); *Payne v. Walmsley*, 185 So. 88 (La. App. 2d Cir. 1938). Thus, in spite of the 1938 enactment, mineral leases continued to be treated as contracts creating only personal obligations governed by the code articles on lease. See *Arnold v. Sun Oil Co.*, 218 La. 50, 46 So. 2d 369 (1950) (mineral lease not protected by the recordation statutes). The case was overruled by legislative action. See La. Acts 1950, No. 7, LA. R.S. 9:2721-24 (1950). See also *Coyle v. North Am. Oil Consol.*, 201 La. 99, 9 So. 2d 473 (1942) (cancellation of lease); *Amerada Petroleum Corp. v. Reese*, 195 La. 359, 196 So. 558 (1940) (partition). The last case was overruled by the amendment of Article 741 of the Civil Code.

158. La. Acts 1950, No. 6, LA. R.S. 9:1105 (1950). See also LA. CODE OF CIVIL PROCEDURE art. 3664 (1960).

159. 235 La. 529, 105 So. 2d 210 (1958). See also *Calhoun v. Gulf Refining Co.*, 235 La. 494, 507, 104 So. 2d 547, 551 (1958): "This Court, in dealing with the ordinary oil and gas lease, has applied the articles of the Code applicable to leases The lessee under a lease contract does not obtain a real right in the sense of absolute dominion, and a lease is not one of those real obligations which attach as a burden to the land, as does a servitude; in other words, a lease is not a *jus in re*, but a *jus ad rem*, a right upon the thing."

160. 240 La. 641, 124 So. 2d 764 (1960). See also *Tinsley v. Seismic Explorations, Inc.*, 239 La. 23, 117 So. 2d 897 (1960).

emphasis that "a mineral lessee or sublessee . . . is the owner of a real right."¹⁶¹ This article was intended, according to an accompanying comment by the redactors of the Code, "to show a clear and unmistakable legislative intent, despite any of the language of the majority opinion in *Reagan v. Murphy* . . . to permit the enforcement of any of the rights enumerated in the above articles by the actions recognized in this Chapter."¹⁶²

Thus, though personal contracts in nature, mineral leases always function as real rights in connection with issues of procedure¹⁶³ and in connection with issues of substantive law in a number of situations specified by jurisprudence and legislation. Indicatively, the mineral lease functions as a real right in connection with the problem of reliance on public records;¹⁶⁴ transfer of mineral leases must be made by written instrument which, in order to affect interests of third parties, must be recorded;¹⁶⁵ mineral leases are subject to mortgage as immovable property;¹⁶⁶ and, in a partition by licitation of an immovable, the rights of the lessee are in effect equivalent to real rights.¹⁶⁷ On the other hand, a mineral lessee enjoys less than full proprietary protection in case of geophysical trespass,¹⁶⁸ has no standing to claim a right of passage over private roads as owner of an estate,¹⁶⁹ and his lease may not be lost

161. See LA. CODE OF CIVIL PROCEDURE art. 3664 (1960). In spite of the broad language of this article, there is still room for doubt that the mineral lessee will enjoy in Louisiana the full protection accorded by the real actions. See Comment, *The Louisiana Mineral Lease as a Contract Creating Real Rights*, 35 TUL. L. REV. 218, 229 (1960).

162. See LA. CODE OF CIVIL PROCEDURE art. 3664 (1960), Comment (a).

163. Cf. note 137 *supra*; *Alison v. Wideman*, 210 La. 314, 26 So. 2d 826 (1946) (petitory action); *Payne v. Walmsley*, 185 So. 88 (La. App. 2d Cir. 1938) (venue).

164. See LA. R.S. 9:2721-24 (1950); *Serio v. Chadwick*, 66 So. 2d 9 (La. App. 2d Cir. 1953).

165. *Davidson v. Midstates Oil Corp.*, 211 La. 882, 31 So. 2d 7 (1947); *Arkansas Louisiana Gas Co. v. R. O. Roy & Co.*, 196 La. 121, 198 So. 768 (1940) (leases incorporeal immovable property within the meaning of Article 471 of the Civil Code for purposes of formalities of transfer).

166. See LA. Acts 1910, No. 232, LA. R.S. 30:109 (1950); LA. Acts 1938, No. 96, LA. R.S. 9:5101 (1950); *Hebert & Lazarus, The Louisiana Legislation of 1938, Mortgage of Mineral Rights*, 1 LA. L. REV. 80 (1938).

167. See LA. CIVIL CODE art. 741 (1870) as amended by LA. Acts 1940, No. 336, and LA. Acts 1950, No. 521; *Nabors, Report of the Mineral Law Committee of the Louisiana State Law Institute*, 26 TUL. L. REV. 172, 180 (1952).

168. See *Tinsley v. Seismic Explorations, Inc.*, 239 La. 23, 117 So. 2d 897 (1960). But the owner of a mineral servitude enjoys full proprietary protection. See *Holcombe v. Superior Oil Co.*, 213 La. 684, 35 So. 2d 457 (1948). It would seem that the *Tinsley* case is overruled by Article 3664 of the Code of Civil Procedure.

169. See *Harwood Oil & Mining Co. v. Black*, 240 La. 641, 124 So. 2d 764 (1960).

by the ten-year prescription of non-use which applies to real rights.¹⁷⁰ The mineral lease, therefore, should necessarily be classified as a hybrid contract governed in part by the Code provisions on lease, sale, or servitudes, and in part by special legislation and rules of judge-made law.¹⁷¹

The involved structure of mineral rights in Louisiana proved sufficiently resilient in 1939 to accommodate a newcomer, a brand new "real right"¹⁷² called mineral royalty¹⁷³ for lack of a better descriptive term. "Royalty" is a polysemantic word which in the framework of concrete legal relationships may designate rights of variable content. Ordinarily, however, abstraction is made of two basic concepts, "rent royalty" and "mineral royalty." The rent royalty forms part of the consideration for a lease and, analytically, appears to be a right partaking of the nature of the lease complex.¹⁷⁴ The mineral royalty, on the other hand, has evolved as a distinct right to a portion of minerals actually produced or their proceeds.¹⁷⁵ This right "to share in the production"¹⁷⁶ has been designated by the courts as "a species of a real right,"¹⁷⁷ "a real obligation,"¹⁷⁸

170. See *Reagan v. Murphy*, 235 La. 529, 105 So.2d 210 (1958). The reasoning of the *Reagan* case has been disapproved by the legislature, at least insofar as it may bear on real actions. See LA. CODE OF CIVIL PROCEDURE art. 3664 (1960), Comment (a). Cf. *Chicago Mill & Lumber Co. v. Ayer Timber Co.*, 131 So.2d 635 (La. App. 2d Cir. 1961) (leases with option to purchase; prescription of non-use starts running from the date of actual purchase rather than from the date of lease). Upon extinction of the mineral servitude, the mineral rights revert to the present owner of the land. Accordingly, leases granted by the holder of the servitude terminate upon extinction of the servitude. *Calhoun v. Gulf Refining Co.*, 235 La. 494, 104 So.2d 547 (1958).

171. See Comment, *The Louisiana Mineral Lease as a Contract Creating Real Rights*, 35 TUL. L. REV. 218 (1960).

172. See *Vincent v. Bullock*, 192 La. 1, 187 So. 35 (1939).

173. The mineral royalty is also known as "royalty properly-so-called," "royalty *per se*," "landowner's royalty," and plainly as "royalty." See DAGGETT, MINERAL RIGHTS IN LOUISIANA 17, 249 (1949).

174. The rent royalty is also known as "lease royalty." See DAGGETT, *id.* at 250.

175. In contrast to the rent royalty, the mineral royalty "[does] not constitute a part of the consideration due by the lessee under a specific lease." *Gulf Refining Co. v. Hunter Co.*, 231 La. 1002, 1013, 93 So.2d 537, 541 (1957).

176. *Crown Central Petroleum Corp. v. Barousse*, 238 La. 1013, 1019, 117 So.2d 575, 577 (1960).

177. *Vincent v. Bullock*, 192 La. 1, 187 So. 35 (1939). See also *Crown Central Petroleum Corp. v. Barousse*, 238 La. 1013, 117 So.2d 575 (1960); *Union Oil & Gas Corp. v. Broussard*, 237 La. 660, 112 So.2d 96 (1959) (second rehearing); *Continental Oil Co. v. Landry*, 215 La. 518, 41 So.2d 73 (1949); *Humble Oil & Refining Co. v. Guillory*, 212 La. 646, 33 So.2d 182 (1947).

178. *Vincent v. Bullock*, 192 La. 1, 187 So. 35 (1939) (a real obligation in favor of the plaintiffs, their heirs or assigns). See also *Crown Central Petroleum Corp. v. Barousse*, 238 La. 1013, 117 So.2d 575 (1960); *St. Martin Land Co. v. Pinckney*, 212 La. 605, 33 So.2d 169 (1947); *Humble Oil & Refining Co. v. Guillory*, 212 La. 646, 33 So.2d 182 (1947) (2d rehearing); *United Gas Public Service Co. v. Barrett*, 179 So. 506 (La. App. 2d Cir. 1938).

"a conditional obligation,"¹⁷⁹ "an appendage of a mineral right,"¹⁸⁰ and as a "*jus ad rem*."¹⁸¹ Some of these designations are obviously contradictory and mutually exclusive while others are compatible and complementary.¹⁸² Leaving aside names given to the mineral royalty and concentrating on its functional characteristics, a well-defined though sketchy picture may be drawn.

The mineral royalty may be carved out of the land ownership directly (in case mineral rights are not yet segregated from the land ownership) or from outstanding mineral rights by means of "reservation" or "sale."¹⁸³ A recorded mineral royalty is an "absolute" right that can be asserted against anyone and not merely a contractual arrangement, an obligation, existing between the original parties to the transaction.¹⁸⁴ The royalty right is freely assignable by its holder; correlative duties of the holder of mineral rights are assignable, as a matter of law, along with the mineral rights. Thus, any successor to the minerals charged with a royalty will be under an obligation to pay

179. *Union Oil & Gas Corp. v. Broussard*, 237 La. 660, 112 So.2d 96 (1959) (2d rehearing). See also *LeBlanc v. Haynesville Mercantile Co.*, 230 La. 299, 88 So.2d 377 (1956); *St. Martin Land Co. v. Pinckney*, 212 La. 605, 33 So.2d 169 (1947).

180. *Union Oil & Gas Corp. v. Broussard*, 237 La. 660, 112 So.2d 96 (1959) (2d rehearing). See also *Continental Oil Co. v. Landry*, 215 La. 518, 526, 41 So.2d 73, 75 (1949) ("an appendage of the right of the mineral owner, and depends upon the continued existence of the right to which it is an appendage"). It has been also stated that "a mineral right is necessarily superior to a royalty right." *Ibid*.

181. Concurring opinion by Hamiter, J., in *St. Martin Land Co. v. Pinckney*, 212 La. 605, 33 So.2d 169 (1947). The mineral royalty has also been described as "sale of a hope." *Ibid*.

182. For example, in the light of traditional classification and accepted meaning of the words, a real right cannot be simultaneously a conditional obligation nor can a *jus in re* be also a *jus ad rem*. Such loose use of traditional terminology leads to confusion of ideas and is meaningless. On the other hand, a real right may well be an appendage of a mineral right and a real obligation may also be conditional. Finally, real right and real obligation are quite frequently synonymous terms, though accurate terminology ought to reserve the term "real right" to describe the active side, and "real obligation" the passive side, of the same relationship.

183. See *Union Oil & Gas Corp. v. Broussard*, 237 La. 660, 112 So.2d 96 (1959) (sale); *Arkansas Fuel Oil Co. v. Sanders*, 224 La. 448, 69 So. 745 (1954) (reservation); *St. Martin Land Co. v. Pinckney*, 212 La. 605, 33 So.2d 169 (1947) (sale); *Vincent v. Bullock*, 192 La. 1, 187 So. 35 (1939) (reservation).

184. *Cf.* text at note 55 *supra*; *United Gas Public Service Co. v. Barrett*, 179 So. 506, 511 (La. App. 2d Cir. 1938): "The transfer of a portion of the rents to become due by the lessee to the law firm was a rent charge imposed upon an immovable property and when it was recorded . . . it was notice to the public and affected third persons, and any purchaser of mineral rights in and under the land affected thereby subsequent thereto, took them subject to the recorded contract of transfer." In the meanwhile, the Louisiana Supreme Court rejected the view that the mineral royalty is a "rent charge" (*Vincent v. Bullock*, 192 La. 1, 187 So. 35 (1939)), but the rest of the quotation describes accurately the effect of recordation.

proceeds subsequently accruing. The mineral royalty differs from both the mineral servitude and the mineral lease in that it is "passive" and does not include the right to search for minerals.¹⁸⁵ But, as in the case of both mineral servitude and lease, it seems to be an open question whether the holder of the mineral rights has a correlative fiduciary duty to exercise reasonable care with the view to securing production.¹⁸⁶

Since participation in the proceeds of minerals depends on actual production, it is commonly stated that the mineral royalty is an obligation subject to a suspensive condition.¹⁸⁷ This judicial rationalization has caused some confusion, for it is well settled that, unless production is secured, the mineral royalty is extinguished by the lapse of a ten-year prescriptive period.¹⁸⁸ The designation of the mineral royalty as a conditional obligation is obviously inconsistent with the application of a ten-year (liberative) prescription which starts to run as soon as the

185. *Continental Oil Co. v. Landry*, 215 La. 518, 41 So.2d 73 (1949). See also *Crown Central Petroleum Corp. v. Barousse*, 238 La. 1013, 117 So.2d 575 (1960).

186. *Cf. Humble Oil & Refining Co. v. Guillory*, 212 La. 646, 673, 33 So.2d 182, 191-92 (1947) (rehearing): "Had a third person sought to obtain from Guillory . . . a lease, the granting of it, of course depended on his will. . . . In the usual mineral royalty deed the purchaser does not receive from the landowner an obligation to drill or to grant a lease for exploitation purposes." *Cf. concurring opinion by Hamiter, J., in St. Martin Land Co. v. Pinckney*, 212 La. 605, 626, 33 So.2d 169, 175 (1947): "When royalty is sold, as the purchaser knows, the landowner does not obligate himself either to develop the land or to lease to a third person for exploration purposes."

187. See *St. Martin Land Co. v. Pinckney*, 212 La. 605, 615, 33 So.2d 169, 172 (1947) ("not a servitude but a conditional obligation, depending on an uncertain event, that prescribes in ten years if the event did not happen prior thereto"). See also *Union Oil & Gas Corp. v. Broussard*, 237 La. 660, 112 So.2d 96 (1959); *LeBlanc v. Haynesville Mercantile Co.*, 230 La. 299, 88 So.2d 377 (1956).

188. See *Gulf Refining Co. v. Hunter Co.*, 231 La. 1002, 1013, 93 So.2d 537, 541 (1957): "The ten year prescriptive period began to run on the day the interest was so reserved or acquired rather than at the time production was obtained." Civil law doctrine and the Louisiana Civil Code distinguish clearly between *liberative* prescription which applies to actions for the enforcement of rights and prescription for *non-use* which applies to real rights other than full ownership. Which prescription applies to the mineral royalty "was not answered in the *Vincent* case, although a prescription of ten years was there applied." Hamiter, J., concurring opinion in *St. Martin Land Co. v. Pinckney*, 212 La. 605, 627, 33 So.2d 169, 176 (1947). Nor was this question answered in subsequent cases which merely indicated that the applicable prescription was one *liberandi causa*. *Cf. Union Oil & Gas Corp. v. Broussard*, 237 La. 660, 112 So.2d 96 (1959) and cases cited; *Gulf Refining Co. v. Hunter Co.*, 231 La. 1002, 93 So.2d 537 (1957) where the court mentioned Articles 3528, 3529, 3549, 3544, and 3546 of the Civil Code. Justice Hamiter concluded in his concurring opinion in *St. Martin Land Co. v. Pinckney*, 212 La. 605, 627, 33 So.2d 169, 176 (1947) that "a mineral royalty, although a real right . . . is governed by Article 3544 which provides for the prescribing of a personal action by ten years." It is submitted, however, that the prescription applicable to mineral royalty is the prescription for non-use established in Article 3546 of the Civil Code. This solution is compatible with the classification of the mineral royalty as a real right. *Cf. text at note 194 infra*.

royalty is constituted. If the mineral royalty were a conditional obligation, *liberative* prescription ought to start running only upon fulfillment of the condition.¹⁸⁹ Consistent analysis may be achieved only on the basis of the traditional civilian distinction between *rights* and *claims* deriving from rights.¹⁹⁰ In this light it is apparent that the mineral royalty is an unconditional right, while claims deriving therefrom are subject to a suspensive condition.¹⁹¹ However, though an unconditional right, the mineral royalty is subject to a ten-year prescription for *non-use* (rather than liberative prescription) by analogy to other real rights.¹⁹² This prescription might be regarded as a resolutive condition attached by the law to real rights other than full ownership.

The ten-year precriptive period cannot be waived in advance nor can a lengthier period be stipulated; but a running prescription can be interrupted by acknowledgment.¹⁹³ In all cases prescription is interrupted by production¹⁹⁴ in the tract subject

189. Cf. argument by counsel in *Gulf Refining Co. v. Hunter Co.*, 231 La. 1002, 93 So.2d 537 (1957); concurring opinion by Hamiter, J., in *St. Martin Land Co. v. Pinckney*, 212 La. 605, 622, 33 So.2d 169, 174 (1947): "But I do not agree with the conclusion in the Vincent case that a mineral royalty is an obligation dependent on a suspensive condition within the meaning and intendment of Civil Code, Articles 2013, 2021 and 2038. If it were such an obligation, the operation of the contract, according to the very provisions of those articles, would be suspended until the occurrence of the event upon which it is conditioned (the production of minerals); and, hence, the applicable liberative prescription would commence to run only from that time."

190. See 1 ENNECERUS-NIPPERDEY, *ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS* 960-68 (1955).

191. Cf. concurring opinion by Hamiter, J., in *St. Martin Land Co. v. Pinckney*, 212 La. 605, 627, 33 So.2d 169, 176 (1947): "And since there is an unconditional, completed sale on the signing of the deed, prescription liberandi causa necessarily commences to run at that time."

192. Cf. LA. CIVIL CODE arts. 790, 3546 (1870). Cf. note 188 *supra*.

193. See *Union Sulphur Co. v. Lognion*, 212 La. 632, 644, 33 So.2d 178, 182 (1947): "To interrupt the current of that prescription the mere acknowledgment of the existence of the right is insufficient. There must appear also an intention of the person making the acknowledgment that the accruing prescription be interrupted." See also *Crown Central Oil & Gas Corp. v. Broussard*, 237 La. 660, 112 So.2d 96 (1959); *Union Oil Co. v. Touchet*, 229 La. 316, 86 So.2d 50 (1956).

194. Question has arisen as to what constitutes production. The law today is settled that production means successful drilling operations, i.e., production of minerals in paying quantities. Drilling which, though earlier commenced, proves successful after the lapse of ten years does not fulfill the suspensive condition. But the condition is fulfilled even where the minerals produced are not presently marketable. See *LeBlanc v. Haynesville Mercantile Co.*, 230 La. 299, 88 So.2d 377 (1956); *Union Oil Co. of California v. Touchet*, 229 La. 316, 86 So.2d 50 (1956); *Union Sulphur Co. v. Andrau*, 217 La. 662, 47 So.2d 38 (1950); *Union Sulphur Co. v. Lognion*, 212 La. 632, 33 So.2d 178 (1947); *St. Martin Land Co. v. Pinckney*, 212 La. 605, 33 So.2d 169 (1947). Production from one of the tracts is not production from the other non-contiguous tracts. *Continental Oil Co. v. Landry*, 215 La. 518, 41 So.2d 73 (1949). Depending on the particular agreement, production from one sand may not fulfill the condition as to possible exploitation from

to the mineral royalty or in adjacent tracts according to a valid unitization agreement.¹⁹⁵ Depending on the terms of the contract by which the mineral royalty is constituted, unitization of only part of the tract subject to the royalty may or may not interrupt the running of the prescription as to the entire tract.¹⁹⁶ The minority or other legal disability of the holder of the mineral royalty does not suspend the prescription.¹⁹⁷

The suspensive condition attached to claims deriving from a mineral royalty ordinarily must be fulfilled within ten years from the date in which the royalty is constituted.¹⁹⁸ Thus, if there is no production from the tract of land for which the royalty is granted or from adjacent tracts in accordance with a valid unitization agreement, the suspensive condition fails. This rule is seemingly contrary to Article 2038 of the Civil Code, which provides that if there be no time fixed the conditions may be fulfilled at any future time.¹⁹⁹ The contradiction is only apparent; the failure of the condition is merely the necessary consequence of the extinction of the right by the running of the prescriptive period. Thus, the interrelation between the *ten-year prescriptive period applicable to the royalty right* and the *suspensive condition attached to the claim* for a share in the proceeds ought to be noted. Causes interrupting prescription constitute at the same time fulfillment of the suspensive condition; completion of the prescription constitutes failure of the suspensive condition.

It has been stated that a prescribed mineral royalty "passes out of the picture"²⁰⁰ and that there is no reversionary interest.

other sands. See *Continental Oil Co. v. Landry*, 215 La. 518, 41 So.2d 73 (1949). "Production" is also relevant for the fulfillment of the suspensive condition. See text at note 198 *infra*.

195. See *Crown Central Petroleum Corp. v. Barousse*, 238 La. 1013, 117 So.2d 575 (1960); *Union Oil Co. v. Touchet*, 229 La. 316, 86 So.2d 50 (1956).

196. See *Crown Central Petroleum Corp. v. Barousse*, 238 La. 1013, 1030, 117 So.2d 575, 581 (1960). The question was "whether a voluntary conventional unitization agreement divided royalty rights into two segments, and [the court] held that those rights were not divided by the agreement."

197. See LA. R.S. 9:5805 (1950).

198. See *Union Sulphur Co. v. Andrau*, 217 La. 662, 670, 47 So.2d 38, 41 (1957): "If the event does not happen within ten years the right to share in the production is lost." See also *LeBlanc v. Haynesville Mercantile Co.*, 230 La. 299, 88 So.2d 377 (1956).

199. See LA. CIVIL CODE art. 2038 (1870). *Cf.* *Gulf Refining Co. v. Hunter Co.*, 231 La. 1002, 1012, 93 So.2d 537, 540 (1957): "True the contract did not designate a time within which the event must happen, nevertheless, that time is limited by law and the condition is considered as broken, when the time [10 years] has expired without the event having taken place."

200. *Arkansas Fuel Co. v. Sanders*, 224 La. 448, 450, 69 So.2d 745, 746

Accordingly, contracts reserving a reversionary interest are without object. Alternatively, it has been said that reservation of a reversionary interest would be contrary to the public policy of the state.²⁰¹ This, in functional terms, means that a prescribed mineral royalty benefits the holder of the mineral rights rather than the present owner of the land. The mineral royalty thus appears to be a dismemberment of, and a charge on, the mineral rights.

According to legislative declaration, the mineral royalty in Louisiana ought to be classified as an incorporeal immovable²⁰² protected by the real actions.²⁰³ This classification, however, does not render applicable to the mineral royalty the thirty-year prescriptive period which applies to real actions.²⁰⁴ Since the primary life span of the mineral royalty is limited and the right itself is extinguished after the lapse of ten years without production, real actions for the protection of a non-existing right would be without object.

The foregoing analysis shows that the concept of the mineral royalty has not as yet been fully developed and that there is still room for speculation as to some specific characteristics and attributes of the new right. So far the courts have had the opportunity to settle only a number of concrete questions and further refinement of the concept is to be expected. In the light of the present jurisprudence, the mineral royalty ought to be classified as a *sui generis* real right. It differs from the traditional real rights in that, in the last analysis, it is not a right in corporeal property but a charge on an incorporeal immovable attached to land — the mineral right. It is a real right in the sense that it is an exclusive patrimonial right which, if recorded, may be asserted during its lifetime against the world.

3. *Timber Estates.* — According to Article 465(1) of the Louisiana Civil Code "trees before they are cut down" are immovables by their nature "and are considered as part of the

(1954): "When the royalty right prescribed it passed out of the picture. There was nothing to revert to any one. The parties are in the same position as though no royalty right had ever existed. It was merely a conditional obligation depending on an uncertain event which prescribed in ten years because the event did not occur."

201. See *Union Oil & Gas Corp. v. Broussard*, 237 La. 660, 112 So.2d 96 (1959) (2d rehearing). Currier & Weiss, *The Broussard Case and Prescription of Mineral Royalty*, 34 TUL. L. REV. 685 (1960).

202. See LA. R.S. 9:1005 (1950).

203. See LA. CODE OF CIVIL PROCEDURE art. 3664 (1960).

204. See LA. CIVIL CODE art. 3548 (1870).

land to which they are attached." This provision had been correctly interpreted by Louisiana courts—in the light of its sources and with reference to French jurisprudence and doctrine—to mean that standing timber was a component part of the soil.²⁰⁵ As in France, however, standing timber was held to be susceptible of "mobilization by anticipation," that is, the landowner could sell standing timber as a future movable.²⁰⁶ The purchaser's right was declared to be "ownership" of a movable, governed by all the rules applicable to movable property.²⁰⁷

The legal status of standing timber was altered in Louisiana by Act 188 of 1904. This act provided that "standing timber shall remain an immovable, and be subject to all the laws relative to immovables, even when separated in ownership from the land on which it stands."²⁰⁸ There has been some speculation as to the reasons which prompted this "sweeping" enactment.²⁰⁹ Perhaps the most plausible explanation is that the Louisiana legislature impressed with the relative value of standing timber which by far exceeded the value of land stripped of its timber, sought to afford maximum protection to this valuable asset. Application of the laws governing immovable property would obviously enhance security of title: transfer should be subject to the requirements of written document and recordation, and the holder of timber rights would be able to evoke application of the "real actions" for the protection of his right. The statute affects the legal status of standing timber only if this is owned

205. See Yiannopoulos, *Movables and Immovables in Louisiana and Comparative Law*, 22 LA. L. REV. 517, 519 (1962); note 211 *infra*. On the status of timber as immovable property, see *The Work of the Louisiana Supreme Court for the 1948-1949 Term—Property*, 10 LA. L. REV. 175, 176 (1950); Comment, *The Sale of Standing Timber in Louisiana*, 20 TUL. L. REV. 428 (1946); Note, 15 TUL. L. REV. 475 (1941).

206. See *Lumber Co. v. Sheriff*, 106 La. 414, 418, 30 So. 902 (1901). See also *Williams Cypress Co. v. Dugas*, 7 La. App. 368 (1st Cir. 1928).

207. See note 206 *supra*. See also *Woodruff v. Roberts*, 4 La. Ann. 127 (1849) (wood cut and corded and separated from the land when sold, is movable, and does not pass to the purchaser). Cf. *Voisin v. Schwing Lumber & Shingle Co.*, 131 La. 775, 60 So. 241 (1913); *Eastman v. Harris*, 4 La. Ann. 193 (1849) (*conversion* of cut timber).

208. See La. Acts 1904, No. 188, LA. R.S. 9:1103 (1950): the act does not have retroactive effect. *Williams Cypress Co. v. Dugas*, 7 La. App. 368 (1st Cir. 1928).

209. *The Work of the Louisiana Supreme Court for the 1954-1965 Term—Particular Contracts*, 16 LA. L. REV. 242, 244 (1956). See also *Williams Cypress Co. v. Dugas*, 7 La. App. 368, 374 (1st Cir. 1928) ("The act of 1904 had no other effect upon the status of standing timber . . . except to declare it an immovable, where before that it might have been argued that it was a movable"). Cf. SAUNDERS, LECTURES ON THE CIVIL CODE 156 (1925).

separately. If the landowner is also the holder of the timber rights, standing timber continues to be governed by Article 465(1) of the Civil Code.²¹⁰ In these circumstances standing timber is still a component part of the soil and passes to the purchaser of the land even in the absence of specific mention.²¹¹ Further, the statute does not affect the legal status of felled timber which should be classified as movable property, whether belonging to the owner of the land or to a purchaser.²¹²

Act 188 of 1904 permits horizontal division of land ownership. Thus the sale or reservation of standing timber in Louisiana has the effect of creating two separate and distinct immovables: the timber and the ground.²¹³ Where this happens,

210. Cf. *Buckner-Harmon Wood Contractor v. Norris*, 231 La. 437, 91 So. 2d 594 (1957).

211. See *Wollums v. Hewitt*, 142 La. 597, 77 So. 295 (1918). Cf. *Cousins v. Cusachs*, 6 La. App. 837 (1st Cir. 1927). In these cases standing timber was termed an "accessory" of the land. Accurate terminology should be: "component part" of the land. See *Yiannopoulos, Introduction to the Law of Things*, 22 LA. L. REV. 756, 783 (1962).

212. See *Gillespie v. W. A. Ransom Lumber Co.*, 132 F. Supp. 11 (E.D. La. 1955), *aff'd*, 234 F.2d 285 (5th Cir. 1956). *But cf. Livaudais v. Williams Lumber Co.*, 34 So. 2d 292 (La. App. 1st Cir. 1948). In that case, defendant, the purchaser of timber, had a period of three years to remove it from the land. More than a year after expiration of this period, and while the land was in the hands of a new owner, the purchaser removed timber which had been cut prior to the expiration of the removal period. An action of trespass followed. Counsel for the defendant argued that felled timber was a movable, and, therefore, had not been transferred to and was not owned by the present landowner. The court held for the plaintiff on two grounds: (1) cut timber is an immovable, citing LA. R.S. 9:1103 (1950); and (2) after expiration of the removal period title to the timber vested in the present landowner. The second ground should be sufficient for the disposition of the case. The first ground does not seem to be well taken: the statute classifies as an immovable *standing* timber separated in ownership of the ground. Cut timber is always a movable. This, however, does not necessarily mean that cut timber is owned by the grantee of the timber estate after expiration of the period for removal. When the parties stipulate a period for removal, ordinarily, they mean removal of *all* timber whether standing or cut. Further, although cut timber is no longer a "component part" of the ground, it may be owned by the present landowner: cut timber, and the reversionary interest, may validly be regarded as "accessories" of the title to the land.

213. See *Stanga v. Lake Superior Piling Co.*, 214 La. 237, 242, 36 So. 2d 778, 779 (1948): "The effect of the timber deed . . . was the creation in favor of defendant of an estate, separate and apart from the land, consisting of all of the then merchantable pine timber." See also *Willetts Wood Products Co. v. Concordia Land & Timber Co.*, 169 La. 240, 124 So. 841 (1929) (reservation); *Brown v. Hodge-Hunt Lumber Co.*, 162 La. 635, 110 So. 886 (1927) (reservation). The separate estate in standing timber is created only after "the ownership therein has been separated from the land." *Buchner-Harmon Wood Contractor v. Norris*, 231 La. 437, 443, 91 So. 2d 594, 596 (1956). Separation of ownership "may be effected either by conveyance or consent, express or implied, of the landowner." *Ibid.* Cf. *Willetts Wood Products Co. v. Concordia Land & Timber Co.*, 169 La. 240, 242, 124 So. 841 (1929) (mortgage of land, with reservation of standing timber, and foreclosure sale by the mortgagee: the court held that "there were created two separate estates as perfectly and completely as if defendant had made a conventional sale of the land and reserved to itself the timber"). Apparently, a timber estate cannot be acquired by a long-term acquisitive prescription because

timber is no longer regarded as a component part of the ground and a sale of the land does not carry title to the timber.²¹⁴ It is a different question when the landowner commits himself to convey both land and timber by general warranty deed. In this case, the landowner will be held liable on his warranty.²¹⁵ The act classifies the interest of the purchaser of timber as an "immovable," and Louisiana courts have given full effect to the obvious legislative intent. Accordingly, the interest of the purchaser if recorded may be asserted against the world, must be conveyed as an immovable, and may be protected by the possessory and real actions.²¹⁶ The sale, being one of an immovable, may be attacked for lesion beyond moiety²¹⁷ and may be subject to action for diminution of the price.²¹⁸

it is questionable whether timber not segregated from the land may become the object of an independent possession. But land with its unsegregated timber may be acquired by acquisitive prescription. Ordinarily, in such case the question is what constitutes possession of timber lands. See *Boudreaux v. Olin Industries*, 232 La. 405, 94 So.2d 417 (1957) (10 years' acquisitive prescription; civil and corporeal possession consisting mostly of timber exploitation). See also *Mantel v. Hunt*, 195 La. 201, 197 So. 402 (1940) (cutting timber is sufficient possession). *Cf. Harril v. Pitts*, 194 La. 123, 193 So. 562 (1940); *Williams Cypress Co. v. Dugas*, 7 La. App. 368 (1st Cir. 1928) (20 years' possession of land; timber included). However, where the timber is already separated from the land, possession of the land does not constitute possession of the timber estate; hence, although title to the land may be acquired by acquisitive prescription, this title does not necessarily carry title to the timber. See *Green v. Longville Lumber Co.*, 147 La. 576, 85 So. 596 (1920); *Gray v. Edgar Lumber Co.*, 138 La. 906, 910, 70 So. 877, 878 (1916) (held, possession of land did not carry possession of timber. "The segregation of the timber from the land destroyed its character as an accessory, and converted it into a separate immovable"). *Cf. Bagents v. Crowell Long Leaf Lumber Co.*, 20 So.2d 641, 643 (La. App. 1st Cir. 1945) (*Gray* case distinguished: plaintiff's possession by means of an enclosure extended "to the timber situated on it notwithstanding the creation of the separate timber estate and the alleged possession of that estate by the defendant").

214. *Cf. Brown v. Hodge-Hunt Lumber Co.*, 162 La. 635, 110 So. 886 (1927) (tax sale; when timber is segregated from land ownership separate tax assessment is necessary); *Gray v. Edgar Lumber Co.*, 138 La. 906, 70 So. 877 (1916). See also *Woodruff v. Roberts*, 4 La. Ann. 127 (1849).

215. See *Young v. Sartor*, 152 La. 1064, 95 So. 223 (1923). *Cf. Bodcaw Lumber Co. v. Clifton Heirs*, 169 La. 759, 126 So. 52 (1930); *Mower v. Richardson*, 124 La. 130, 49 So. 1003 (1909).

216. See *Ranger Land Co. v. Aetna Casualty & Surety Co.*, 224 La. 153, 68 So.2d 907 (1953) (timber "real estate" within the meaning of the Louisiana Real Estate Act, LA. R.S. 37:1431-1459, 37:1447 (1950)); *Gray v. Edgar Lumber Co.*, 138 La. 906, 70 So. 877 (1916); *Hill v. Richey*, 225 La. 994, 74 So.2d 190 (1954); *The Work of the Louisiana Supreme Court for the 1953-1954 Term—Real Actions*, 15 LA. L. REV. 399, 400 (1955); *Bagents v. Crowell Long Leaf Lumber Co.*, 20 So.2d 641 (La. App. 1st Cir. 1945). Also the sale of a specified number of trees is sale of immovable property. *Martin Timber Co. v. Jean Lumber Co.*, 227 La. 894, 80 So.2d 855 (1955).

217. See *Smith v. Huie-Hodge Lumber Co.*, 129 La. 28, 55 So. 698 (1911); *Smith v. Huie-Hodge Lumber Co.*, 123 La. 959, 49 So. 655 (1909); *Hydgc v. Barron*, 125 La. 227, 51 So. 126 (1910).

218. *Martin Timber Co. v. Jean Lumber Co.*, 227 La. 894, 80 So.2d 855 (1955); *The Work of the Louisiana Supreme Court for the 1964-1955 Term—Particular Contracts*, 16 LA. L. REV. 242, 244 (1956).

Contracts establishing timber rights have been consistently classified by Louisiana courts as "sales," notwithstanding assertions by interested parties that creation of a servitude was intended.²¹⁹ These decisions, based on interpretation of obscure contractual provisions, should not be taken to exclude the possibility of creating a timber servitude by clear language. A timber servitude established for the benefit of an estate would be a predial servitude under the Civil Code²²⁰ and one established for the benefit of a person would be either usufruct or a personal servitude similar to the mineral servitude in nature.²²¹ Timber rights could, presumably, be also established by lease²²² or license.²²³ But apparently these potential forms of timber exploitation have not been utilized in Louisiana. Outright sale of standing timber is the prevailing form of exploitation, a form which proved quite flexible to satisfy the needs of a growing timber industry.

The juridical nature of the timber estate created by sale or reservation has not been fully explored. Language in numerous Louisiana decisions indicates that it is an estate separate and distinct from the ownership of the land, immovable by legislative fiat.²²⁴ Statutory and judicial language have designated this estate as "ownership"²²⁵ — a right of ownership in an immovable which is destined to become movable. But the

219. See *Stanga v. Lake Superior Piling Co.*, 214 La. 237, 36 So.2d 778 (1948); *Cooley v. Meridian Lumber Co.*, 195 La. 631, 197 So. 255 (1940); *Kavanaugh v. Frost-Johnson Lumber Co.*, 149 La. 972, 90 So. 275 (1921); *Simmons v. Tremont Lumber Co.*, 144 La. 719, 81 So. 263 (1919). However, the right to construct a tramway for the removal of timber is a servitude accessory to the right of removal. Prescription of the servitude runs concurrently with the prescription of timber rights. *Kavanaugh v. Frost-Johnson Lumber Co.*, *supra*.

220. See LA. CIVIL CODE arts. 646-48, 709-10 (1870).

221. Usufruct as a method of timber exploitation is clearly available under the Louisiana Civil Code. Cf. LA. CIVIL CODE arts. 646, § 2, 648, § 2 (1870). Creation of a personal servitude in favor of the grantee *and his heirs* ought to be available by reference to *Frost-Johnson Lumber Co. v. Salling's Heirs*, 150 La. 756, 91 So. 207 (1922), applied by analogy. Cf. notes 143-147 *supra*.

222. Cf. *Cooley v. Meridian Lumber Co.*, 195 La. 631, 197 So. 255 (1940) (the court indicating the possibility of exploitation by means of a lease).

223. Cf. *W. B. Thompson & Co. v. Union Sawmill Co.*, 121 La. 318, 46 So. 431 (1908) (license to cut timber invalid for want of consideration); *Blackshear v. Hood*, 120 La. 966, 45 So. 957 (1908) (license to cut timber invalid for want of mutuality: potestative condition).

224. See *Bagents v. Crowell Long Leaf Lumber Co.*, 20 So.2d 641, 642 (La. App. 1st Cir. 1945): "The principal contention made by the defendant rests upon what is more or less a fiction in the law that by the sale of the timber from off a certain tract of land there are created what has been held to be two separate and distinct estates . . . This separate tenure of different estates is nowhere provided for in our Civil Code. . . . It finds its basis only in the statutory law."

225. See LA. R.S. 9:1103 (1950); *Willets v. Wood Products Co. v. Concordia Land & Title Co.*, 169 La. 240, 124 So. 841 (1929).

timber estate is neither perpetual nor of equal rank and dignity with land ownership.²²⁶ Ordinarily, the parties fix a period of time within which the timber must be removed from the land. Where no time limit is fixed, the landowner may apply to the courts to set a time limit for removal.²²⁷ If the landowner remains passive, the right of the purchaser is not lost by the ten-year prescription of non-use.²²⁸ Once exercised, the right of the purchaser terminates unless provision is made for continuous exploitation.²²⁹ The time limit for removal may be a long period,

226. See *Willetts Wood Products Co. v. Concordia Land & Timber Co.*, 169 La. 240, 242, 124 So. 841 (1929): "The further contention is made that, when separated in ownership from the land on which it stands, the timber becomes an immovable possessing equal rank and dignity with the land . . . The contention amounts to a legal heresy, and is contrary to numerous decisions of this court." A timber estate, segregated from the land ownership, is susceptible of partition by licitation. However, where the timber is not fully segregated from the land ownership, partition by licitation of the timber estate is not available. *Buckner-Harmon Wood Contractor v. Norris*, 231 La. 437, 91 So. 2d 594 (1956). In this case, an undivided 10/11 of the timber on a tract of land had been segregated in ownership from the land and belonged to one group of persons, while the remaining 1/11 of the timber had not been segregated and belonged to another group of persons. Thus, the latter held a single estate consisting of an undivided 1/11 interest in the land and growing timber. In an action for partition by licitation brought by the holders of the 10/11 interest in the timber estate, the court held that the holders of the 1/11 interest could not be forced to a partition by licitation of the standing timber. "Plaintiffs and defendants," the court declared, "are not owners in common of the same estate which is essential under Articles 1289 and 1308 of the Civil Code for the action of partition. Although plaintiffs undoubtedly own an undivided estate in timber, separate and apart from the land on which it stands, they cannot demand a partition from defendants, who hold a single estate under Article 465 of the Civil Code consisting of an undivided interest in the land and the growing timber." (*Id.* at 442, 91 So. at 596.) "Were plaintiffs to prevail," the court continued, "the contesting defendants would be required to submit to an invasion of their land for the purpose of cutting the timber therefrom and to the segregating of ownership of their single estate in the land to that of land and timber against their will and consent." (*Id.* at 444, 91 So. at 597.)

227. See *Stanga v. Lake Superior Piling Co.*, 214 La. 237, 242, 36 So. 2d 778, 779 (1948): "The failure to fix a time limit in the deed for the removal of such timber did not invalidate the conveyance; the omission may be supplied by application to the courts." See also *Willetts Wood Products Co. v. Concordia Land & Timber Co.*, 169 La. 240, 124 So. 841 (1929); *Simmons v. Tremont Lumber Co.*, 144 La. 719, 81 So. 263 (1919); *Chicago Mill & Lumber Co. v. Lewis*, 68 So. 2d 913 (La. App. 2d Cir. 1954). The period for the removal of the timber fixed in the deed cannot be extended by application to the courts. *Ward v. Hayes-Ewell Co.*, 155 La. 15, 98 So. 740 (1924).

228. See *Stanga v. Lake Superior Piling Co.*, 214 La. 237, 242, 36 So. 2d 778, 779 (1948): "The transaction was a sale of standing timber, not the granting of a servitude, and the landowner cannot have the timber declared forfeited to him, or successfully plead abandonment against defendant's rights under the contract, until the removal limit has been fixed and has expired." See also *Simmons v. Tremont Lumber Co.*, 144 La. 719, 81 So. 263 (1919); *Kavanaugh v. Frost-Johnson Lumber Co.*, 149 La. 972, 90 So. 275 (1921). In fixing the time for removal the courts tend to give effect to the intention of the parties. In the absence of any indication as to the intention of the parties, the courts accord a "reasonable" period of time in the light of all the circumstances. See *Chicago Mill & Lumber Co. v. Lewis*, 68 So. 2d 913 (La. App. 2d Cir. 1954).

229. See *Stanga v. Lake Superior Piling Co.*, 214 La. 237, 242, 36 So. 2d 778, 780 (1948): "If the vendee once removes the timber purchased (that which was

but it is doubtful that it could be stipulated in perpetuity.²³⁰ After the expiration of the time limit for removal, timber rights revert to the landowner unless the contrary is provided for in the contract.²³¹ In case of transfer of title to the land, the reversionary interest belongs to the present landowner.²³² Certain cases have indicated that the reversionary interest may be retained by the former landowner.²³³ Perhaps retention of the reversionary interest should not be permitted for the same reasons that perpetual separation of timber rights from the land ownership should not be recognized.

merchantable on the date of the sale), the contract is terminated, and he cannot later go on upon the cutover land and renew operations." *Clark v. Weaver Bros. Realty Corp.*, 197 La. 63, 200 So. 821 (1941). Quite frequently, determination of timber rights depends on the scope of the conveyance. This is a matter of contractual interpretation. In the absence of any indication as to the intention of the parties, the rule of interpretation is that only "merchantable timber" on the date of the purchase or reservation is to be considered as conveyed. See *Stanga v. Lake Superior Piling Co.*, *supra*; *Clark v. Weaver Bros. Realty Corp.*, *supra*; *Cooley v. Meridian Lumber Co.*, 195 La. 631, 197 So. 255 (1940).

230. See *Willetts Wood Products Co. v. Concordia Land & Timber Co.*, 169 La. 240, 243, 124 So. 841, 842 (1929): "[T]he owner of the timber can [not] require that the timber be permitted to remain on the land in perpetuity without any right in the owner of the land to cause the timber to be removed. No such impossible situation was ever intended or contemplated . . ." In *Cooley v. Meridian Lumber Co.*, 195 La. 631, 197 So. 255 (1940), the contract provided for the removal within a period of 50 years of "all timber standing, being and growing on" the land. Plaintiff landowner claimed that the removal period was "unreasonable" and that, in any case, the contract conveyed title only to "merchantable" timber on the date of conveyance. Without discussion of the question of "reasonableness," the court held for plaintiff: the grant included only merchantable timber at the time of contracting. Further, the court declared that "a sale of timber with a term of [50] years for removal thereof amounts, in practice at least, to a lease or a grant in favor of the vendee of the use of the soil for the production of timber during that time. Such was never contemplated by the parties." *Id.* at 649, 197 So. at 261.

231. See *Crowell & Spencer Lumber Co. v. Burns*, 191 La. 733, 738, 186 So. 85, 87 (1939): "It is well settled that if, in a sale of standing timber, a time limit upon the right of the buyer to remove the timber from the land is fixed in the deed, the title to the timber that is not removed within the time stipulated reverts to the seller, or to his successors or transferees." See also *Ward v. Hayes-Ewell Co.*, 155 La. 15, 98 So. 740 (1924). *Cf.* *Chicago Mill & Lumber Co. v. Lewis*, 68 So.2d 913, 916 (La. App. 2d Cir. 1954): "It is argued that where, in a sale of standing timber, a time limit upon the right of the buyer to remove the timber is fixed in the deed, the title to the timber that is not removed within the time stipulated reverts to the landowner. This legal contention is sound as is well recognized in our jurisprudence, but is without application where the reserver stipulates by clear expression an intent to retain ownership of the timber."

232. See *Crowell & Spencer Lumber Co. v. Burns*, 191 La. 733, 186 So. 85 (1939).

233. See, e.g., *Chicago Mill & Lumber Co. v. Lewis*, 68 So.2d 913 (La. App. 2d Cir. 1954). In this case, a landowner in 1918 had sold all merchantable timber growing on his land with a stipulated period for removal of 25 years. Shortly before expiration of this period, he sold the land to its present owner subject to a reservation of all the growing merchantable timber. In an action by the former landowner and "reserver" of the timber estate against the present landowner, to restrain him from cutting timber, the court held that upon termination of the 1918 contract the timber rights reverted to the "reserver" and not the present landowner.

The preceding considerations indicate that sale and reservation of standing timber in Louisiana create real rights which approximate full ownership of an *immovable* while the timber stands and become complete ownership of a *movable* after the timber is cut down. The time limit for removal and the existence of reversionary interests indicate that timber rights are less than full ownership in Louisiana. They should be regarded as a permissible dismemberment of land ownership and, perhaps, should be classified as a *sui generis* real right. This right differs from emphyteusis since no annual *canon* is due but could be regarded as a species of superficies.

4. *Restraints on the Use and Disposition of Property* — Under the Civil Code, restraints on the use and disposition of property²³⁴ can be either personal obligations²³⁵ or servitudes,²³⁶ *i.e.*, real rights established in conformity with the applicable code provisions and following the land in the hands of any possessor. Contemporary developments in Louisiana, however, have brought into focus the question whether restraints on the use and disposition of property may be *sui generis* real rights distinct and distinguishable from servitudes. This question arises frequently in connection with the issue of the validity of so-called "building restrictions."²³⁷

In a leading case, *Queensborough Land Co. v. Cazeau*,²³⁸ the Louisiana Supreme Court indicated that the three elements

234. The expression "restraints on the use or disposition of property" is broad enough to include servitudes (personal and real, conventional and legal), real obligations, "equitable restrictions" or "covenants running with the land," and (strictly speaking) "building restrictions." Restraints on the use or disposition of property are ordinarily imposed in order to preserve and enhance real property values by the maintenance of certain building standards and uniformity in the use of the land.

235. See *Cambais v. Douglas*, 167 La. 791, 120 So. 369 (1929). See also *Louisiana & A. Ry. v. Winn Parish Lumber Co.*, 131 La. 288, 59 So. 403, 411-13 (1912) (separate opinion on rehearing by Provosty, J.).

236. See text at notes 113-17 *supra*. It might be argued that restraints on the use or disposition of property may be neither personal obligations nor servitudes but "real obligations" under the Civil Code. "Real obligations," however, are not an independent category of rights under the Code but merely the *passive* side of all real rights.

237. From the viewpoints of urban and suburban development, "building restrictions" constitute the most important category of restraints on the use of land. Building restrictions have been defined as limitations on the use of property "inserted in deeds in pursuance of a general plan devised by the ancestor in title to maintain certain building standards and uniform improvements." *Salerno v. De Lucca*, 211 La. 659, 666, 30 So.2d 678, 679 (1947) and cases cited. The requirements of an "ancestor in title" and of "a general plan" are said to distinguish building restrictions from servitudes. See Comment, *Building Restrictions in Louisiana*, 21 LA. L. REV. 468, 469 (1961) and cases cited.

238. 136 La. 724, 67 So. 641 (1915).

of ownership, the *usus*, *fructus*, and *abusus*, are susceptible of subdivision within certain limits. Thus, a restriction on the right to alienate (*abusus*) to persons of a particular race was declared to be valid and enforceable by means of an injunction so long as the restraint was not perpetual but for a "reasonable" duration. The court also stated that such a restriction could operate as a resolutive condition so that its violation might give rise to an action for the resolution of the sale rather than merely to a right for the enforcement of the restrictions.²³⁹ Restrictions on the right to dispose of property to persons of a particular race are no longer enforceable²⁴⁰ but restrictions on alienation to certain classes of individuals on grounds other than race, and for a reasonable period of time, may still be valid. These restrictions, where valid, are veritable real rights and should be classified as servitudes, whether personal or real.²⁴¹

Not only the *abusus* but also the *usus* of property may validly be restricted within certain limits. Indeed, landowners and developers of urban and suburban land have since the beginning of the century imposed restrictions limiting future use of property to certain specified purposes, prohibiting the erection of certain types of structures, or specifying the type and value of buildings to be erected.²⁴² Louisiana courts have thus been faced with the problem of enforcing these restrictions

239. Cf. LA. CIVIL CODE art. 2045 (1870). Where an injunction affords adequate relief, resolution of the sale should not be allowed. See Hebert & Lazarus, *The Louisiana Legislation of 1938*, 1 LA. L. REV. 80, 113 (1939). In addition to injunction and resolutive action, remedies available for violation of restrictions may be, in appropriate cases, an action for damages, an action for the forceful removal of buildings, and an action for nuisance. See Comment, *Building Restrictions in Louisiana*, 21 LA. L. REV. 468, 472 (1961).

240. See *Shelley v. Kraemer*, 334 U.S. 1 (1948). The United States Supreme Court has held that judicial proceedings enforcing racially discriminatory covenants by injunction or damage actions constitute state or federal action in deprivation of the equal protection of the laws. See *Hurd v. Hodge*, 334 U.S. 24 (1948); *Barrows v. Jackson*, 346 U.S. 249 (1953).

241. See *Queensborough Land Co. v. Cazeaux*, 136 La. 724, 67 So. 641 (1915). The servitude would be real if established in favor of another estate and personal if established in favor of a person. Cf. LA. CIVIL CODE arts. 646-48 (1870). On the possibility of creation of personal servitudes other than usufruct, use, or habitation, see notes 113-17 *supra*, and the excellent dissertation of Provosty, J., in his separate opinion on rehearing in *Louisiana & A. Ry. v. Winn Parish Lumber Co.*, 131 La. 288, 59 So. 403, 411-28 (1912).

242. See *McGuffy v. Weil*, 240 La. 758, 125 So.2d 154 (1960); *Cambais v. Douglas*, 167 La. 791, 120 So. 369 (1929); *Clark v. Reed*, 122 So.2d 344 (La. App. 2d Cir. 1960); *Sherrouse Realty Co. v. Marine*, 46 So.2d 156 (La. App. 2d Cir. 1950); *LeBlanc v. Palmisano*, 43 So.2d 263 (La. App. Orl. Cir. 1949); *Chexnayder v. Rogers*, 95 So.2d 381 (La. App. Orl. Cir. 1957); Comment, "Equitable Restrictions" in *Louisiana*, 33 TUL. L. REV. 822 (1959).

to protect the interests of former landowners or of landowners who bought in reliance upon the restrictions placed on neighboring property. In that regard, the courts had to balance the demands of a firmly established public policy opposing restrictions on the use and alienability of property²⁴³ with the requirements of contractual freedom and the right of individuals to dispose of their property as they please.²⁴⁴

In order to afford protection in concrete cases, Louisiana courts had to develop techniques designed to dispense with the requirement of "privity" between violators of the restrictions and persons seeking to enforce them. And to attain this end, Louisiana courts have classified building restrictions as servitudes, real obligations, and covenants running with the land.²⁴⁵ Building restrictions pertaining to the height of buildings, building set-offs from property lines, value of buildings to be erected, and commercial use have been almost consistently classified by Louisiana courts as predial servitudes.²⁴⁶ Authority for this classification was properly found in Article 728 of the Civil Code, which was treated, at least by implication, as merely illustrative of permissible servitudes. But as predial servitudes

243. See *Female Orphan Society v. Young Men's Christian Ass'n*, 119 La. 278, 44 So. 15 (1907); Comment, *Restraints on the Power of Conventional Alienation of Immovables in Louisiana*, 8 TUL. L. REV. 262 (1933).

244. See LA. CIVIL CODE arts. 491, 1764 (1870).

245. As a general rule, obligations (*i.e.*, personal rights) cannot be enforced by persons who are not in privity with the obligor. *Res inter alios acta aliis non nocet*. In order to afford protection in concrete cases, therefore, Louisiana courts should either assert the existence of privity and enforce the restriction as a personal obligation or classify it as a real right which can be enforced irrespective of privity. Restrictions which could easily classify as servitudes have not involved problems. But, in the opinion of the courts, several of these restrictions can not classify as servitudes either because there is no dominant estate or because they consist *in faciendo*. And in order to justify the enforcement of the restriction in the absence of privity, the courts resort to the classification of particular restrictions as "real obligations" or as "covenants running with the land." Actually, the difficulty posed by the requirement of a dominant estate is presented only in connection with a subdivision situation where the subdivider imposes certain restrictions before he sells his first lot. And even in this case, though the restriction does not constitute a servitude, it is a "destination made by the owner" under Articles 767-68 of the Civil Code and can become a servitude as soon as the tract of land is subdivided into several lots. *Carlou v. Marquart*, 10 So. 2d 246 (La. App. Orl. Cir. 1942). It seems therefore that there is no obstacle whatsoever for the classification of building restrictions as servitudes under the Code.

246. See *McGuffy v. Weil*, 240 La. 758, 125 So. 2d 154 (1960); *Holloway v. Ransome*, 216 La. 317, 43 So. 2d 673 (1949); *Ouachita Home Site & Realty Co. v. Collie*, 189 La. 521, 179 So. 841 (1938); *Goodwin v. Alexander*, 105 La. 658, 30 So. 102 (1901); *Heirs of Delongy v. Mercer*, 43 La. Ann. 205, 8 So. 903 (1891). It should be noted, however, that in most of these cases the expressions "real obligations" and "covenants running with the land" were also employed as equivalents to "servitudes." Cf. *Clark v. Reed*, 122 So. 2d 344 (La. App. 2d Cir. 1960) (building restrictions termed "servitudes, real rights or obligations, or covenants running with the land").

must be for the benefit of another estate and may not involve affirmative duties,²⁴⁷ the Louisiana Supreme Court felt compelled in *Cambais v. Douglas*²⁴⁸ to interpret a deed imposing affirmative duties as establishing a personal obligation rather than a servitude.

In a second line of cases, building restrictions are termed "real obligations" accompanying the land in the hands of subsequent purchasers.²⁴⁹ This classification is said to rest on Article 2012 of the Civil Code. The Louisiana Supreme Court has indicated in the past that the enumeration of real obligations in Article 2012 is exclusive rather than illustrative; and, since building restrictions are not mentioned therein, they could not be classified as real obligations.²⁵⁰ But the Court of Appeal for the First Circuit declared in *Tucker v. Woodside*²⁵¹ that the building restrictions are real obligations within the meaning of Article 2012, distinguishable from predial servitudes. According to this classification, assumption of affirmative duties is possible and the requirement of a dominant estate as well as the problem of lack of privity are effectively dispensed with.

Finally, in a third line of cases, building restrictions have been classified as "covenants running with the land."²⁵² This is common law terminology deriving from institutions so foreign to civil law property that its continued use can only result in confusion. In common law jurisdictions, chancery courts faced with the problem of validity of restrictions concerning use of lands among persons other than the original contracting par-

247. Cf. LA. CIVIL CODE arts. 648-53, 655 (1870).

248. 167 La. 791, 120 So. 369 (1929). In this case, the purchaser bound himself to erect "a single residence" on a particular lot. It seems that the court grasped at a straw when it characterized the obligation in question as one *in faciendo*. Obviously, the intention of the parties was that no building other than a single residence should be erected. What then if the parties had employed this *negative expression*? Perhaps the true ground of decision was the observation of the court that there was no "general development plan" as in a subdivision situation; in these circumstances the court was not willing to recognize the existence of a real right.

249. See *Salerno v. DeLucca*, 211 La. 659, 30 So.2d 678 (1947); *Queensborough Land Co. v. Cazeaux*, 136 La. 724, 67 So. 641 (1915); *Tucker v. Woodside*, 53 So.2d 503 (La. App. 1st Cir. 1951). Cf. *Ouachita Home Site & Realty Co. v. Collie*, 189 La. 521, 179 So. 841 (1938) ("real obligations" which "may be likened to servitudes").

250. *Cambais v. Douglas*, 167 La. 791, 120 So. 369 (1929).

251. 53 So.2d 503 (La. App. 1st Cir. 1951).

252. See *Pizzolato v. Cataldo*, 202 La. 675, 12 So.2d 677 (1943); *Hill v. William P. Ross, Inc.*, 166 La. 581, 117 So. 725 (1928); *Herzberg v. Harrison*, 102 So.2d 554 (La. App. 1st Cir. 1958) ("real rights running with the land"); *LeBlanc v. Palmisano*, 43 So.2d 263 (La. App. Orl. Cir. 1949) (particular contract was not a covenant running with the land).

ties, gradually fashioned old institutions of contract law into a doctrine of "equitable restrictions."²⁵³ This doctrine, applicable to "covenants running with the land," has been imported to Louisiana quite uncritically and unnecessarily. Article 728 of the Civil Code, applied by analogy, could produce comparable results entirely compatible with Louisiana's civilian past and present.

Whether termed servitudes, real obligations, or covenants running with the land, building restrictions in Louisiana are veritable real rights.²⁵⁴ They are clearly a dismemberment of the right of ownership, most frequently of the right to use or to dispose of, and can be asserted against the world. Preferably, building restrictions should be classified as a species of predial servitudes imposed for the benefit of another estate or other estates, with certain peculiar characteristics concerning their creation, enforcement, and extinction²⁵⁵ which distinguish them from ordinary predial servitudes. The recent jurisprudence of the Louisiana Supreme Court tends to establish uniform and consistent terminology in this respect by classifying building restrictions as continuous nonapparent servitudes.²⁵⁶ There is no good reason to support the borrowing of common law terminology and doctrine nor the classification of building restrictions as real obligations. The nature of real obligations is controversial and the concept itself confusing.²⁵⁷

5. *Chattel Mortgage*.—Industrialization and expansion of business rendered necessary the introduction of the chattel mortgage in Louisiana as an additional security device.²⁵⁸ While

253. Comment, "*Equitable Restrictions*" in *Louisiana*, 33 *TUL. L. REV.* 822, 826 (1959). See also 5 *POWELL, REAL PROPERTY* 161 (1962); *CLARK, COVENANTS AND INTEREST RUNNING WITH THE LAND* 93-94 (1947).

254. See *Salerno v. DeLucca*, 211 La. 659, 30 So.2d 678 (1947); *Edwards v. Wiseman*, 198 La. 382, 3 So.2d 661 (1941); *Queensborough Land Co. v. Cazeaux*, 136 La. 724, 67 So. 641 (1915).

255. Comment, *Building Restrictions in Louisiana*, 21 *LA. L. REV.* 468, 470, 471, 473 (1961); Comment, "*Equitable Restrictions*" in *Louisiana*, 33 *TUL. L. REV.* 822, 828, 834, 836 (1959).

256. *McGuffy v. Weil*, 240 La. 758, 764, 125 So.2d 154, 157 (1960): "The restrictive covenant, asserted herein, is a continuous non-apparent servitude." Accordingly, "such a servitude can be established only by title." *Ibid.* See also *Clark v. Reed*, 122 So.2d 344, 349 (La. App. 2d Cir. 1960): "The servitude need not be necessarily established by a deed or created in an act of sale. It suffices that the servitude was created and imposed in an act sufficient in form for the transfer of property."

257. On the confusion of ideas surrounding the notion of real obligations, see *GINOSSAR, DROIT RÉEL, PROPRIÉTÉ ET CRÉANCE* 94-101 (1961).

258. See *DAGGETT, LOUISIANA PRIVILEGES AND CHATTEL MORTGAGE* 17 (1942). "Prior to the year 1912, a chattel mortgage was unknown to the laws of Lou-

originally limited to certain specifically enumerated species of movable property,²⁵⁹ the chattel mortgage device became gradually available on all kinds of corporeal movable property²⁶⁰ including universalities of things.²⁶¹ Hypothecation of movables is not a principle foreign to civil law.²⁶² Under the regime of the Louisiana Civil Code, however, mortgage was available only on corporeal immovable property, certain enumerated incorporeal immovables, and ships which though movables were for this particular purpose subject to rules governing immovable property.²⁶³ Adoption of the chattel mortgage in Louisiana cannot be regarded as a break with the civilian tradition, particularly since the device was shaped by the legislature and courts upon firm civilian doctrine.²⁶⁴

Chattel mortgage may be defined as a contract whereby the owner hypothecates corporeal movable property as security for the performance of an obligation.²⁶⁵ The contract creates merely a privilege and does not involve transfer of title to the property.²⁶⁶ The chattel mortgage is always accessory of a principal debt upon which it depends for its very existence. Discharge of the principal debt thus terminates the chattel mortgage, though foreclosure of the mortgage does not always extinguish the principal debt.²⁶⁷ The chattel mortgage possesses practically the

isiana and such a mortgage executed in another state was not enforceable in this State after the mortgaged chattel had been brought here." General Motors Acceptance Corp. v. Nuss, 195 La. 209, 196 So. 323, 324 (1940). See also Delop v. Windsor, 26 La. Ann. 185 (1874); Franklin v. Warfield, 8 Mart.(N.S.) 442 (La. 1830).

259. See La. Acts 1912, No. 65: "lumber, logs and livestock." For a historical analysis of Louisiana chattel mortgage legislation see DAGGETT, *LOUISIANA PRIVILEGES AND CHATTEL MORTGAGE* 18-20 (1942); Miller, *The Louisiana Chattel Mortgage and Small Loan Acts*, 23 TUL. L. REV. 61 (1948).

260. See LA. R.S. 9:5365 (1950); Boyd v. Hendrickson, 175 La. 377, 143 So. 332 (1932). The appropriate security device for incorporeal movables is pledge. See LA. CIVIL CODE art. 3155 (1870). Cf. LA. R.S. 9:4301-04 (1950) (pledge of rights under mineral leases and contracts); LA. R.S. 9:4321-23 (1950) (pledge of incorporeal rights not evidenced in writing).

261. See LA. R.S. 9:5351 (1950), as amended by La. Acts 1952, No. 50, La. Acts 1956, No. 90; *Louisiana Legislation of 1948—Chattel Mortgage*, 9 LA. L. REV. 21-22 (1948). On the concept of universalities of things, see Yiannopoulos, *Introduction to the Law of Things*, 22 LA. L. REV. 756, 781 (1962).

262. See 12 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 12-13 (1953).

263. See LA. CIVIL CODE art. 3289 (1870). Cf. LA. CIVIL CODE p. 458, art. 36 (1808); LA. CIVIL CODE art. 3256 (1825). Cf. Shepherd v. The Orleans Cotton Press Co., 2 La. Ann. 100 (1847).

264. See DAGGETT, *LOUISIANA PRIVILEGES AND CHATTEL MORTGAGE* 18 (1942).

265. See Boyd v. Hendrickson, 175 La. 377, 143 So. 332 (1932).

266. See General Acceptance Corp. v. Nuss, 192 So. 248 (La. App. Orl. Cir. 1939), reversed on other grounds, 195 La. 209, 196 So. 323 (1940); DAGGETT, *LOUISIANA PRIVILEGES AND CHATTEL MORTGAGE* 21 (1942).

267. See Motor Finance Co. v. Universal Motors, 182 So. 143 (La. App. 1st

same attributes as the mortgage on immovables²⁶⁸ and differs from pledge of movables (pawn) in several regards. Actual delivery of movable property to the pledgee is essential to a pledge, while the chattel mortgage is valid without delivery;²⁶⁹ a pledge may be made of both corporeal and incorporeal movables, while chattel mortgage may affect corporeal movables only;²⁷⁰ the pledge is valid as between the parties even if orally constituted and effective against third parties if proved by written instrument, while the chattel mortgage must be always in writing and must be duly recorded in order to affect third parties.²⁷¹

The chattel mortgage is a security device independent of other available remedies. A creditor whose debt is secured by a chattel mortgage may proceed to enforce the personal responsibility of his debtor and ignore his security completely or he may choose to foreclose his mortgage by ordinary or executory proceedings.²⁷² The holder of a chattel mortgage can enforce his right even though the chattel has become an immovable by nature or by destination under Articles 464, 467-469 of the

Cir. 1938); *General Contract Purchase Corp. v. Barrow*, 136 So. 902 (La. App. 1st Cir. 1931). *Cf.* LA. CIVIL CODE arts. 3284, 3285 (1870).

268. See LA. R.S. 9:5363 (1950), *as amended*, La. Acts 1952, No. 441: "All laws and rules and all remedies and processes now or hereafter made available to creditors for the protection or enforcement of their rights under mortgages affecting immovables shall be available to creditors of obligations secured by mortgages affecting movables." *Cf.* LA. CIVIL CODE arts. 3278-3289 (1870).

269. See LA. CIVIL CODE arts. 3152, 3162 (1870). *Cf.* LA. R.S. 9:5351 (1950), *as amended*, La. Acts 1952, No. 50, La. Acts 1956, No. 90.

270. See LA. CIVIL CODE arts. 3154, 3155 (1870). *Cf.* LA. R.S. 9:5365 (1950); *Boyd v. Hendrickson*, 175 La. 377, 143 So. 332 (1932).

271. *Cf.* LA. CIVIL CODE 3158 (1870). *Cf.* LA. R.S. 9:5354 (1950), *as amended*, La. Acts 1954, No. 481: "Every such mortgage shall be effective as against third persons from the time of filing in the proper offices, and the filing shall be notice to all parties of the existence of the mortgage, which shall be superior in rank to any privilege or preference arising subsequently thereto." As between the parties, however, the chattel mortgage is effective from its execution. See *Harris Finance Corp. v. Fridge*, 219 La. 1106, 55 So.2d 707 (1951); *United Novelty Co. v. Salemi*, 68 So.2d 808 (La. App. 2d Cir. 1953).

272. See LA. CODE OF CIVIL PROCEDURE arts. 3721-22 (ordinary proceedings); arts. 2631-2754, 3721, 3723 (executory proceedings) (1960). *Cf.* *Morris Plan Bank v. Glockner*, 161 So. 792 (La. App. Orl. Cir. 1935); *Monroe Automobile & Supply Co. v. Bowman*, 15 La. App. 203, 131 So. 585 (2d Cir. 1930). Under Article 2631 of the Louisiana Code of Civil Procedure, executory proceedings are available only where the mortgage or privilege is evidenced by "authentic act." However, chattel mortgages "under private signature" duly acknowledged are specifically enforceable by virtue of La. Acts 1952, No. 441. See LA. CODE OF CIVIL PROCEDURE art. 2631 (1960), Comment (c) (2); *General Motors Acceptance Corp. v. Anzelmo*, 222 La. 1019, 64 So.2d 417 (1953); Note, 14 LA. L. REV. 289 (1953). As to the availability of executory proceedings in the case of a chattel mortgage on a motor vehicle under private signature duly acknowledged, see LA. CODE OF CIVIL PROCEDURE art. 2631 (1960), Comment (c) (3).

Civil Code;²⁷³ he has also the right to pursue the property in the hands of a third possessor, provided that his right has not been paralyzed by peremption of the recordation, prescription of the principal obligation, or by the limited application of the *bona fide* purchaser doctrine.²⁷⁴ The chattel mortgagee thus enjoys both the right of preference and the right to follow the property.²⁷⁵ Provided that his right is superior in rank, the chattel mortgagee may assert it by filing an intervention in a proceeding under which the property subject to the mortgage is seized by other creditors.²⁷⁶ But the chattel mortgagee cannot enforce his right by taking possession of the property without legal process or without the consent of the debtor.²⁷⁷ All these attributes and characteristics of the chattel mortgagee's right make it plain that it should be classified as a real right in Louisiana.²⁷⁸

273. See LA. R.S. 9:5357 (1950). This statute declares that a mortgaged chattel "shall be and remain movable so far as the mortgage upon it is concerned." See also LA. R.S. 9:5351 (1950), *as amended*, La. Acts 1952, No. 50, La. Acts 1956, No. 90: "[S]uch building or buildings erected from such [mortgaged] materials shall, notwithstanding any other provision of the Revised Statutes or of the Civil Code, have the status of a movable for the purpose of the mortgage and shall be covered thereby and R.S. 9:5357 shall apply thereto." See also Xiannopoulos, *Movables and Immovables in Louisiana and Comparative Law*, 22 LA. L. REV. 517, 544-47 (1962).

274. LA. R.S. 9:5354 (1950), *as amended*, La. Acts 1954, No. 481. With respect to the rights of a third possessor, see LA. CODE OF CIVIL PROCEDURE art. 3743 (1960). *Cf.* Gulf States Finance Corp. v. Moses, 56 So.2d 221 (La. App. 2d Cir. 1951) (extinction of a chattel mortgage according to the applicable provisions of the Civil Code).

275. See LA. R.S. 9:5363 (1950), *as amended*, La. Acts 1952, No. 441; LA. CODE OF CIVIL PROCEDURE arts. 2378, 3741-43 (hypothecary action) (1960); Liquid Carbonic Corp. v. Leger, 169 So. 170 (La. App. 1st Cir. 1936) (mortgages whether on movables or immovables confer a right of preference and the right to follow); Black v. O. K. Radiator & Sheet Metal Works, 152 So. 782 (La. App. Or. Cir. 1934) (holder of chattel mortgage has the right, in appropriate cases, to pursue the property in the hands of third persons by hypothecary action or otherwise).

276. See LA. CODE OF CIVIL PROCEDURE arts. 1091-92 (1960). In general, the broadened concept of "intervention" operates in the same manner as the "third opposition" under Articles 395 through 403 of the Code of Practice of 1870. *Id.*, Comment (a). *Cf.* Roberts v. Atkins, 141 So. 427 (La. App. 2d Cir. 1932); Soady Building Co. v. Collins, 137 So. 631 (La. App. 2d Cir. 1931); Securities Sales Co. of Louisiana v. Breithaupt, 7 La. App. 417 (2d Cir. 1928).

277. Illegal seizure of a mortgaged chattel constitutes an "offense" under Article 2315 of the Louisiana Civil Code. See Hernandez v. Harson, 237 La. 389, 111 So.2d 320 (1959); Grandeson v. International Harvester Credit Corp., 223 La. 504, 66 So.2d 317 (1953); Harris v. Franklin Finance Co., 65 So.2d 798 (La. App. 2d Cir. 1953); Harris v. Stem, 30 So.2d 889 (La. App. Or. Cir. 1947); Elders v. Montgomery Ward & Co., 172 So. 191 (La. App. 2d Cir. 1937); Horton v. Kavanaugh-Hinton Motor Co., 15 La. App. 226, 131 So. 497 (2d Cir. 1931); Reed v. Shreveport Furniture Co., 7 La. App. 134 (2d Cir. 1927).

278. *Cf.* text at notes 68-69 *supra*. As in the case of all real rights, a chattel mortgage cannot be constituted on indefinite future property. See Note, 15 TUL. L. REV. 314 (1941). But a previously executed chattel mortgage may attach as

6. *Privileges.* — The question of the juridical nature of privileges and their classification as personal or real rights has prompted exhaustive discussion and controversies in the literature of civil law.²⁷⁹ In the French Civil Code, privileges are dealt with in a subdivision of Title XVIII, Book III, devoted to "Privileges and Mortgages." The Louisiana Civil Code, Book III, Title XXI, deals with privileges and the following Title XXII in the same book is devoted to mortgages. Apart from this systematic arrangement, which tends to distinguish between privileges and mortgages, the relevant articles in the Louisiana Civil Code follow in the main the arrangement and substantive content of the corresponding articles in the French Civil Code.

The Louisiana Civil Code establishes the general rule that "the property of the debtor is the common pledge of his creditors, and the proceeds of its sale must be distributed among them ratably, unless there exist among the creditors some lawful causes of preference" (Article 3183). Such "lawful causes of preference" are privileges and mortgages (Article 3183). Privilege is defined as "a right, which the nature of a debt gives to a creditor, and which entitles him to be preferred before other creditors, even those who have mortgages" (Article 3186). Privileges may exist on movables, immovables, or both (Article 3189). Privileges on movables may be "either general, or special on certain movables" (Article 3190). General privileges on movables are enumerated in Article 3191 and special privileges in Article 3217. Privileges on immovables may also be general or special; the Code does not say so expressly but this is apparent in the light of detailed provisions. Thus, Article 3249 enumerates as special privileges on immovables the vendor's privilege, the privilege of those furnishing labor and supplies, and the privilege of those "making or repairing levees, bridges, ditches, and roads on the land." Article 3252 enumerates general privileges which attach both to movables and immovables.

Mortgage is defined as "a right granted to the creditor over the property of the debtor for the security of his debt, and gives

soon as specifically described property subject to such a mortgage is acquired. See *Soady Building Co. v. Collins*, 18 La. App. 164, 137 So. 631 (2d Cir. 1931).

279. Cf. 2 PLANIOL, *TREATISE ON THE CIVIL LAW* pt. 2, p. 426 (1959): "Although the notion of privilege was simple in Roman law, it has become uncertain and confused in modern law; they have brought together under this single name things quite different, to such an extent that it is today impossible to give to privilege a self-contained and unified theory." (Translation by the Louisiana State Law Institute).

him the power of having the property seized and sold in default of payment" (Article 3278). The Code indicates that "mortgage is a species of pledge, the thing mortgaged being bound for the payment of the debt or fulfillment of the obligation" (Article 3279). Mortgages are distinguished as general or special (Article 3288) and as conventional, legal, or judicial (Article 3286). Conventional mortgages may be either general or special, depending on the agreement of the parties (Article 3290). Legal mortgages are general mortgages in the absence of legal provision to the contrary (Article 3328). According to Article 3329 "the creditors who have either a privilege or mortgage on immovables recorded according to law may pursue their claims thereon into whatever hands the immovables may pass, as provided in Article 2378, or in Articles 3721 through 3743, respectively, of the Code of Civil Procedure."

Commentators elaborating on corresponding provisions in the French Civil Code have reached at least three different conclusions concerning the juridical nature of privileges in general and the classification of each particular privilege as a personal or real right. According to one view *all* privileges are real rights.²⁸⁰ Under a second view privileges (other than the real rights of pledge and mortgage) are merely *causes of preference* attached to personal rights.²⁸¹ Finally, according to a third view, privileges may be either personal or real rights depending on whether they bear on movables or immovables and on whether they are general or special privileges. Thus, it has been urged that special privileges on immovables are real rights (*hypothèques privilégiées*) while special privileges on movables and general privileges on immovables are personal rights.²⁸² It would seem that

280. See POPLAWSKI, *LA NOTION DE PRIVILÈGE EN DROIT ROMAINE ET EN DROIT CIVIL FRANÇAIS* 295-303 (Diss. Bordeaux 1913); 13 BEUDANT ET LEREBOURS-PIGEONNIÈRE, *COURS DE DROIT CIVIL* 300 (1948).

281. See 2 COLIN, CAPITANT ET JULIOT DE LA MORANDIÈRE, *TRAITÉ DE DROIT CIVIL* 941-43 (1953). In this treatise mortgage and pledge are classified as species of the genus "privilege." The notion of privilege is thus broadened to include *real rights* (mortgage, pledge and special privileges on movables and immovables in the nature of real security and *rights of preference* (all privileges other than real rights)).

282. See 2 PLANIOL ET RIPERT, *TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL* 877 (1937); 12 *id.*, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 272-76 (1953). *Of.* 3 AUBRY ET RAU, *COURS DE DROIT CIVIL FRANÇAIS* 185-86 (1900). In this treatise privileges are distinguished into *purely personal*, *real*, and *mixed*. "Purely personal" are the general privileges on movables and the special privileges on movables with the exception of those attached to the real right of pledge. "Real" are the privileges on immovables whether general or special, and the right of mortgage. "Mixed" are the special privileges on movables incidental to a contractual or statutory right of pledge.

the controversy is without purpose. An analytically preferable approach is to regard privileges as accessory rights of preference which may be attached by the law to any right, whether personal or real.²⁸³ This view is supported by Article 3186 of the Louisiana Civil Code, which declares that privilege is "a right which the nature of a debt gives to a creditor." Accordingly, a relevant question is which *privileged* rights are real and which personal.

In France, classification of privileged rights as personal or real is said to be determinative of the questions of divisibility of the privilege and of its enforcement in the hands of third parties.²⁸⁴ Courts in Louisiana, however, are seldom inclined to derive practical consequences from abstract classifications. The process is reversed and a privileged right can be classified as personal or real only in the light of its function. The special privileges on immovables created by Article 3249 of the Civil Code function as veritable mortgages and should be regarded as attached to real rights.²⁸⁵ All other privileges in the Civil Code whether bearing on movables or immovables are merely *causes of preference* incidental to personal rights. Similarly, some of the privileges created by special legislation are attached to real rights²⁸⁶ and others to personal rights.²⁸⁷ Detailed functional analysis of all privileges in Louisiana would exceed the scope of this study. In the following pages dealing with the nature of vendor's and lessor's rights, attention will be necessarily focused on privileges accorded to vendors and lessors in Louisiana.

7. *Vendor's Rights.* — The vendor of movables and immovables has under the Louisiana Civil Code a "privilege" on the things sold for the payment of the purchase price.²⁸⁸ In addition, the unpaid vendor has the right to demand the dissolution of sales on credit by judicial process²⁸⁹ and the dissolution of cash sales

283. Cf. BAUDRY-LACANTINERIE, *TRAITÉ DE DROIT CIVIL*, V Supplement by Bonnecase 478 (1930) ("privilege is the quality of a right").

284. See 2 COLIN, *CAPITANT ET JULLIOT DE LA MORANDIÈRE, TRAITÉ DE DROIT CIVIL* 941-42 (1953).

285. Cf. text at note 282 *supra*; text at notes 322-23 *infra*.

286. See, e.g., LA. R.S. 9:4501 (1950), as amended, La. Acts 1960, No. 31, § 1; LA. R.S. 9:4502 (1950), as amended, La. Acts 1960, No. 31, § 1.

287. See, e.g., LA. R.S. 9:4801 (1950) as amended by La. Acts 1960, No. 60, § 1; LA. R.S. 9:4813 (1950).

288. See LA. CIVIL CODE arts. 3217, 3327 (movables); arts. 3249, 3271 (immovables) (1870).

289. See LA. CIVIL CODE art. 2561 (1870). Dissolution of the sale under Article 2561 may be effected only by judicial proceedings. *Mossy Motors v. McRedmond*, 12 So. 2d 719 (La. App. Orl. Cir. 1943). Article 2561 applies to both mov-

of movables by extra-judicial notice.²⁹⁰ The juridical nature of the privilege and of the right of dissolution will be considered separately.

The vendor's privilege is a distinct right of security for the unpaid balance of the thing sold.²⁹¹ It is a substantive,²⁹² accessory²⁹³ right which exists only on the property sold.²⁹⁴ It arises by operation of law as a legal concomitant to a contract of sale²⁹⁵ and is transferable to the vendor's successors by operation of law without contractual subrogation.²⁹⁶ The privilege may attach to any object, movable or immovable, corporeal or incorporeal, which is susceptible of alienation by a contract of sale. The privilege exists between the parties without recordation as to *both* movables and immovables.²⁹⁷ A vendor's privilege on immovables

ables and immovables. *Atkins v. Garrett*, 252 Fed. 280 (W.D. La. 1917).

290. See LA. CIVIL CODE art. 3229 (1870). It has been suggested that the right of dissolution under this article is available to the vendor without the need of judicial proceedings. See DAGGETT, *LOUISIANA PRIVILEGES AND CHATTEL MORTGAGE* 101 (1942). *But cf.* *Millaudon v. New Orleans Water Co.*, 11 Mart. (O.S.) 278 (La. 1822) (indicating, under the corresponding article of the 1808 Code, the necessity of judicial dissolution). For other rights and remedies of the vendor under Louisiana law, see Comment, *The Action of Resolution as an Accessory of the Credit in Contracts of Sale*, 1 LA. L. REV. 800, n. 3 (1939).

291. See *Johnson v. Bloodworth*, 12 La. Ann. 699 (1857); note 325 *infra*; DAGGETT, *LOUISIANA PRIVILEGES AND CHATTEL MORTGAGE* 90-168 (1942); Comment, *The Conditional Sale in Louisiana*, 2 LA. L. REV. 338 (1940). The vendor's privilege, as a *right of preference*, is distinguishable from any contractual or statutory right that a vendor may have to seize and remove the things sold from the purchaser's premises. Under the Louisiana Constitution, homestead property and certain items of personal property are exempt from seizure, but if subject to a vendor's privilege, they may be seized. LA. CONST. art. XI, §§ 1, 2. However, according to LA. R.S. 9:4563 (1950), property exempt from seizure cannot be seized and removed by vendors "under the assumption that a buyer or transferee has by agreement given the right of entry and removal." Unlawful seizure and removal of personal property by the vendor gives rise to claim for damages. *Luthy v. Philip Werlein Co.*, 163 La. 752, 112 So. 709 (1927). Seizure of sewing machines and pianos for the enforcement of a vendor's privilege is authorized by LA. R.S. 9:4561 (1950).

292. *Willey v. St. Charles Hotel Co.*, 52 La. Ann. 1581, 28 So. 182 (1899); *Whiston v. Stodder*, 8 Mart. (O.S.) 95 (La. 1820).

293. See *State ex rel. Landry v. Broussard*, 177 So. 403 (La. App. 1st Cir. 1937); *Perot v. Levasseur*, 21 La. Ann. 529 (1869).

294. See *Forrey v. Strange*, 158 La. 941, 105 So. 21 (1925); *Posner v. Little Pine Lumber Co.*, 157 La. 73, 102 So. 16 (1924); *Ferguson & Hall v. Creditors*, 19 La. 278 (1841).

295. See LA. CIVIL CODE arts. 3227, 3249 (1870); *DeJean v. Hebert*, 31 La. Ann. 729 (1879); *Boner v. Mahle*, 3 La. Ann. 600 (1848). In that respect, a preliminary issue arises as to the characterization of a particular contract as one of sale. See *Tangipahoa Bank & Trust Co. v. Kent*, 70 F.2d 139 (5th Cir. 1934); *St. Mary Iron Works v. Community Manufacturing Enterprise*, 119 So. 564 (La. App. 1st Cir. 1929).

296. See LA. CIVIL CODE art. 2645 (1870); *Succession of Forstall*, 39 La. Ann. 1052, 3 So. 277 (1887); *Perot v. Levasseur*, 21 La. Ann. 529 (1869); *Jeckell v. Fried*, 18 La. Ann. 192 (1866). See also *Smith v. Taylor*, 14 La. Ann. 663 (1859); LA. CIVIL CODE art. 2161 (1870).

297. See *Schutzman v. Dobrowolski*, 191 La. 791, 186 So. 338 (1939); *Thomp-*

must be recorded to affect interest of third parties.²⁹⁸ In general, there is no machinery available for the recordation of a vendor's privilege on movables²⁹⁹ though it appears from the reported cases that solicitous parties have at times recorded such privileges in the chattel or real mortgage records.³⁰⁰

Vendor's privileges on movables, as well as unrecorded privileges on immovables, are lost when the things sold are no longer in the physical possession of the purchaser.³⁰¹ As an exception to this general rule, limited protection has been given to certain vendors by special legislation.³⁰² Where the purchaser resells things burdened with a vendor's privilege, a question arises as to whether the original vendor retains a privilege on the price. The vendor does not have a general privilege on the property of the purchaser for the payment of the price³⁰³ and, therefore, in case of a cash sale by the purchaser the privilege of the original vendor is lost. But if the price has not been paid by the second purchaser, the price is said to represent the goods; accordingly, the original vendor retains his privilege on the debt.³⁰⁴ Where

son v. Comeau, 23 La. Ann. 555 (1871); Sanders v. Dosson, 3 La. Ann. 587 (1848).

298. See LA. CIVIL CODE art. 3271 (1870). Cf. LA. R.S. 9:2721-24 (1950).

299. Cf. LA. CONST. art. XIX, § 19; LA. CIVIL CODE art. 3227 (1870).

300. See Carlin v. Gordy, 32 La. Ann. 1285 (1880); Boner v. Mahle, 3 La. Ann. 600 (1848).

301. See LA. CIVIL CODE art. 3227 (1870); D. H. Holmes Co. v. Morris, 188 La. 431, 177 So. 417 (1937); Dreyfous v. Cade, 138 La. 297, 70 So. 231 (1915); Kuhn & Co. v. Embry & Pilcher, 35 La. Ann. 488 (1883); Heard v. Noble, 9 La. App. 153 (2d Cir. 1928). In that respect, a frequently litigated issue is what constitutes loss of possession by the purchaser. Cf. Flint & Jones v. Rawlings, 20 La. Ann. 557 (1868) (sale and actual delivery to subsequent vendee terminates original vendee's possession); Allen, Nugent & Co. v. Buisson, 35 La. Ann. 108 (1883) (a vendor of cotton is entitled to have the sale annulled for nonpayment of the price when the vendee is in actual or constructive possession). It had been held that the execution of a subsequent chattel mortgage on the thing sold does not involve "alienation" and delivery of possession. Continental Bank & Trust Co. v. Succession of McCan, 151 La. 555, 92 So. 55 (1922); Weiss v. Hudson Construction Co., 151 La. 1, 91 So. 525 (1922). Nor does a subsequent real mortgage involve alienation and delivery of possession of things subject to a vendor's privilege, although these things may have been placed on the premises for their service and improvement. See Cristina Inv. Corp. v. Gulf Ice Co., 55 So.2d 685 (La. App. 1st Cir. 1951). But a pledge constituted on a thing subject to a vendor's privilege involves transfer of possession and terminates the privilege of the vendor. Pierson v. Carmouche, 146 La. 798, 84 So. 59 (1920). For detailed discussion, see DAGGETT, LOUISIANA PRIVILEGES AND CHATTEL MORTGAGE, 119-24 (1942).

302. See LA. R.S. 9:4541-43 (1950).

303. See Shakespeare, Smith & Co. v. Ware, 38 La. Ann. 570 (1886); Ward v. Brandt, 11 Mart.(O.S.) 331 (La. 1882).

304. See Nelson & Co. v. Simpson, 9 La. Ann. 311 (1854); SAUNDERS, LECTURES ON THE CIVIL CODE 503 (1925). In case the things sold are destroyed by fire, the vendor's privilege attaches to "the claim or money due to the owner or vendee under policies of insurance covering that property." LA. R.S. 9:4581 (1950).

the purchaser becomes insolvent, a vendor's privilege attaches to the proceeds of a sale by receivers, or, in the case of a judicial sale of the property, to the proceeds in the hands of the court.³⁰⁵

The vendor's privilege on a movable is lost when the thing is no longer identifiable.³⁰⁶ Loss of identity has been held to be a question of fact.³⁰⁷ Loss of identity occurs clearly when a movable is merged with other similar movables.³⁰⁸ When a movable merges with an immovable and becomes an immovable by nature or by destination, the test of loss of identity involves difficulties. It is clear that the vendor's privilege is not lost and that a thing preserves its identity when it becomes an immovable by destination by being placed by the owner for the "service and improvement" of the immovable.³⁰⁹ But when a movable becomes an immovable by nature under Articles 464 or 467 of the Civil Code, or an immovable by destination by virtue of its "permanent attachment" to the immovable under Articles 468 and 469, the movable may lose its identity and the vendor his privilege.³¹⁰ In that regard, loss of identity may consist merely in the fact that the thing cannot be removed without damage to it or to the property to which it is attached.³¹¹ Certain older cases seemed to indicate that recordation could preserve the privilege in case the movable became an immovable by nature or destination,³¹² but

305. See *Terry v. Terry*, 10 La. 68 (1836); *Millaudon v. New Orleans Water Co.*, 11 Mart.(O.S.) 278 (La. 1822).

306. See LA. CIVIL CODE art. 3228 (1870); *Newman v. Cannon*, 43 La. Ann. 712, 9 So. 439 (1891); *McCan & Sons v. Bradley*, 38 La. Ann. 482 (1886); *Whipple v. Hertzberger*, 11 La. Ann. 475 (1856); *Ferguson & Hall v. Creditors*, 19 La. 278 (1841); *Stackhouse v. Foley's Syndics*, 1 Mart.(O.S.) 228 (La. 1811).

307. See *Swoop v. St. Martin*, 110 La. 237, 34 So. 426 (1903).

308. See LA. CIVIL CODE arts. 3230, 3231 (1870). It has been stated that these articles have been taken, and applied, in Louisiana, out of context. See *DAGGETT, LOUISIANA PRIVILEGES AND CHATTEL MORTGAGE* 124 (1942). Cf. *Newman v. Cannon*, 43 La. Ann. 712, 9 So. 439 (1891); *Monticello v. Delavasio*, 191 So. 162 (La. App. 1st Cir. 1939); *Brown v. Liggett*, 141 So. 409 (La. App. 2d Cir. 1932).

309. See *Shelly v. Winder*, 36 La. Ann. 182 (1884). Cf. *Globe Automatic Sprinkler v. Bell*, 183 La. 937, 165 So. 150 (1935); *Caldwell v. Laurel Grove Co.*, 175 La. 928, 144 So. 718 (1932) (movables *not* immobilized). See also *Yiannopoulos, Movables and Immovables in Louisiana and Comparative Law*, 22 LA. L. REV. 517, 542-44 (1962).

310. See *Milliken & Farewell v. Roger*, 138 La. 823, 70 So. 848 (1916); *Gary v. Burguières*, 12 La. Ann. 227 (1857); *W. M. Bailey & Sons v. Western Geophysical Co.*, 66 So. 2d 424 (La. App. 2d Cir. 1953); *Monroe Automobile & Supply Co. v. Cole*, 6 La. App. 337 (2d Cir. 1927).

311. See *Milliken & Farewell v. Roger*, 138 La. 823, 70 So. 848 (1916); *Swoop v. St. Martin*, 110 La. 237, 34 So. 426 (1903); *Monroe Automobile & Supply Co. v. Cole*, 6 La. App. 337 (2d Cir. 1927). Cf. *Caldwell v. Laurel Grove Co.*, 175 La. 928, 144 So. 718 (1932); *Globe Automatic Sprinkler Co. v. Bell*, 183 La. 937, 165 So. 150 (1936).

312. See *Carlin v. Gordy*, 32 La. Ann. 1285 (1880); *Gary v. Burguières*, 12

other cases have quite correctly dispensed with recordation as determinative of the question of loss of identity by incorporation.³¹³ Further, a review of Louisiana jurisprudence supports the conclusion that a vendor's privilege is never lost merely because a movable becomes an immovable by nature or destination but only when it has been so incorporated into an immovable that its removal is physically impossible or economically unfeasible.³¹⁴

The vendor's privilege on a movable is also lost when the thing is resold by the purchaser in confusion with a mass of similar things.³¹⁵ Analytically, this is an instance of loss of identity accompanied by loss of physical possession by the purchaser. If loss of physical possession by judicial sale *in globo* is imminent, preference in the proceeds may be secured by separate appraisal fixing the present value of the thing.³¹⁶ The vendor's privilege on movables primes subsequent chattel mortgages; whether the vendor's privilege primes a real mortgagee's right to claim things immobilized by nature or by destination is ordinarily determined by reference to the test of facility of removal.³¹⁷ In any case, to prevent the privilege from being lost by the foreclosure of a real mortgage, the vendor must intervene.³¹⁸ He may seize as long as the movable remains in the possession of the purchaser and his right "cannot be defeated because the mortgage creditor has seized, nor because the period for the sale under the writ is close at hand."³¹⁹

The question whether the vendor's privilege is a *real right* or merely a right of *preference* has not been definitely settled in the jurisprudence. According to Article 3227 the vendor of mov-

La. Ann. 227 (1857); Copley v. Sanford, 2 La. Ann. 335 (1847). Cf. Bergeron v. Patin, 34 La. Ann. 534 (1882).

313. See *In re* Receivership of Augusta Sugar Co., 134 La. 971, 64 So. 870 (1914); Cristina Inv. Corp. v. Gulf Ice Co., 55 So.2d 685 (La. App. 1st Cir. 1951).

314. See DAGGETT, LOUISIANA PRIVILEGES AND CHATTEL MORTGAGE 133 (1942); Yiannopoulos, *Movables and Immovables in Louisiana and Comparative Law*, 22 LA. L. REV. 517, 542-44 (1962).

315. See LA. CIVIL CODE art. 3228 (1870); Forrey v. Strange, 158 La. 941, 105 So. 21 (1925); Adams Mach. Co. v. Newman, 107 La. 702, 32 So. 38 (1902); Payne v. Buford, 106 La. 83, 30 So. 263 (1901).

316. See Forrey v. Strange, 158 La. 941, 105 So. 21 (1925); Lambert v. Saloy, 37 La. Ann. 3 (1885); Beasley v. Leesville Motor Co., 4 La. App. 262 (1st Cir. 1925). Cf. LA. CODE OF CIVIL PROCEDURE art. 1092 (1960).

317. See text at note 311 *supra*.

318. See LA. CODE OF CIVIL PROCEDURE art. 1092 (1960). Cf. Legendre v. McCall's Estate, 136 La. 947, 68 So. 86 (1915); Tangipahoa Bank & Trust Co. v. Kent, 70 F.2d 139 (5th Cir. 1934); Pan-American Life Ins. Co. v. Reynaud, 4 La. App. 290 (1st Cir. 1926).

319. Walburn-Swenson Co. v. Darell, 49 La. Ann. 1044, 1046, 22 So. 310, 311 (1897).

ables has only "a preference on the price of his property," as distinguished from a right to follow the property into the hands of a third party. In *Liquid Carbonic Corp. v. Leger*,³²⁰ the admonition was made that "the courts of this state should note a difference between a privilege which confers a right of preference and one which also gives the additional right to follow the property on which it rests into the hands of a third person." In this case, the court seemed to indicate that a vendor's lien (as distinguished from a vendor's recorded chattel mortgage) is not a real right. But in *Caldwell v. Laurel Grove Co.*,³²¹ the Louisiana Supreme Court declared that "we adhere to the jurisprudence established in the long line of cases which we have mentioned and discussed, to the effect that the unpaid vendor enjoys a real right in the thing sold." In spite of broad judicial language, however, it seems that the vendor's privilege does not confer a real right in all cases. Actually, distinction should be made between privileges on movables and privileges on immovables. As to movables, it is quite clear from the Code and the cases that the vendor's privilege is merely a right of preference which can be exercised as long as the thing remains in the physical possession of the debtor. In the absence of fraud, the vendor has no right to follow the thing in the hands of third parties whether acquiring with notice or not.³²² As to immovables, distinction should be made between recorded and unrecorded privileges. Unrecorded privileges on immovables are subject to the same rules governing vendor's privileges on movables. Recorded privileges on immovables confer on the vendor the right to follow the thing and enable him to assert *his right of preference* against the property in the hands of third persons. Thus, the function of a recorded privilege on immovables is very similar to that of a real mortgage and could be regarded as a real right. In France, doctrine and jurisprudence are firmly settled that the vendor's privilege on immovables is a privileged special mortgage (*hypothèque privilégiée*).³²³

The vendor's right of dissolution in case of nonpayment of the purchase price is a resolutory condition implied by law in all contracts of sale.³²⁴ This right is clearly distinguishable from,

320. 169 So. 170, 173 (La. App. 1st Cir. 1936).

321. 175 La. 928, 144 So. 718, 722 (1932).

322. See *Dreyfous v. Cade*, 138 La. 297, 70 So. 231 (1915).

323. See 12 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 658-60 (1953).

324. See LA. CIVIL CODE arts. 2045-47, 2561, 3229 (1870); Monroe, *The Im-*

and independent of, the vendor's privilege and other security devices.³²⁵ Enforcement of the vendor's privilege is "an affirmation of the contract,"³²⁶ whereas exercise of the right of dissolution places "matters in the same state as though the obligation had not existed."³²⁷

The right of dissolution is governed by the code provisions applicable to resolutory conditions in general and by specific provisions applicable to sales.³²⁸ Prerequisites for the exercise of the right, and effects of its exercise, have not been regulated in great detail. Articles 2561-2565, in the title dealing with the obligations of the buyer, regulate certain incidents of dissolution by judicial action. Article 3229, in the title dealing with the vendor's privilege, indicates that cash sales of movables may be set aside by extra-judicial notice within eight days from the day of delivery, if the things are still in the possession of the purchaser. There are no provisions granting a corresponding qualified right of dissolution by extra-judicial notice as to sales of movables on credit or sales of immovables whether for cash or credit.

Exercise of the right of dissolution by judicial action does not involve problems where the things sold remain unencumbered and in the possession of the original purchaser. But where the things become burdened by real rights or pass into the hands of third persons, questions arise as to the availability of dissolution and its effects upon third persons. In the absence of specific regulation in the Code, answers to these questions ought to be obtained by application of well-established principles of code interpretation.

In the light of the historical sources of the Louisiana Civil Code, and on the basis of an argument *a contrario* from Article 3229, the vendor ought to have the right of dissolution by judi-

plied Resolutory Condition for Non-Performance of a Contract, 12 TUL. L. REV. 376, 509 (1938); Comment, *The Action of Resolution as an Accessory of the Credit in Contracts of Sale*, 1 LA. L. REV. 800 (1939).

325. See *Louis Werner Saw Mill Co. v. White*, 205 La. 242, 248, 17 So.2d 264, 266 (1944): "This court has repeatedly and consistently held that the right to dissolve or set aside a sale for the non-payment of the purchase price is an independent, substantive remedy which is in no wise dependent upon the existence of a mortgage or of a privilege." See also *Stevenson v. Brown*, 32 La. Ann. 461 (1880); *School Directors v. Anderson*, 28 La. Ann. 739 (1876); *Shapiro v. Kimbrough*, 20 So.2d 24 (La. App. 1st Cir. 1944).

326. *Heirs of Castle v. Floyd*, 38 La. Ann. 583, 587 (1886).

327. *Louis Werner Saw Mill Co. v. White*, 205 La. 242, 252, 17 So.2d 264, 268 (1944).

328. See LA. CIVIL CODE arts. 2045-2047, 2561-2565, 3229-3231 (1870).

cial action in all cases of nonpayment of the purchase price whether the sale is for cash or credit and whether or not the things are still in the possession of the purchaser. After exercise of the right of dissolution, the vendor ought to be entitled to reclaim the things sold from any person other than one who acquired ownership by acquisitive prescription. However, distinction between prerequisites for the exercise of the vendor's right of dissolution and effects of its exercise has not been always made and conceptual difficulties surrounding the incidents and effects of resolutive conditions in general³²⁹ are reflected in cases involving dissolution of contracts for nonpayment of the price. For these reasons, and perhaps in deference to changed economic and social conditions, Louisiana courts have reached practical results occasionally conflicting with the system of the Code.

According to the jurisprudence the right of dissolution must be exercised by action, even in the circumstances indicated in Article 3229.³³⁰ Admissibility of the action depends on the vendor's ability to restore to the purchaser "the purchase notes and such part of the price as shall have been paid."³³¹ This action, "although it may result in the recovery of immovable property, is regarded as a personal action,"³³² and, accordingly, is subject to a ten-year liberative prescription from the day of default. Presumably, after the judgment of dissolution, a subsequent action for the recovery of property would be subject to the prescription applicable to judgments and its nature would depend on the species of property involved. Where the property sold passes into the hands of third persons, distinction is made between movables and immovables. As to sales of movables, it has been held by analogy to the vendor's privilege and Article 3229 that the right of dissolution may be exercised only so long as the things remain in the possession of the original purchaser.³³³ In

329. See Monroe, *The Implied Resolutive Condition for Non-Performance of a Contract*, 12 TUL. L. REV. 376 (1938).

330. See note 200 *supra*.

331. *Heirs of Castle v. Floyd*, 38 La. Ann. 583, 587 (1886). See also *Louis Werner Saw Mill Co. v. White*, 205 La. 242, 17 So. 2d 264 (1944); *Shapiro v. Kimbrough*, 20 So. 2d 24 (La. App. 1st Cir. 1944).

332. *R. E. E. De Montluzin Co. v. New Orleans & N.E. R.R.*, 166 La. 822, 828, 118 So. 33, 35 (1928).

333. See *W. M. Bailey & Sons v. Western Geophysical Co.*, 66 So. 2d 424 (La. App. 2d Cir. 1953). See also *Allen Nugent & Co. v. Buisson*, 35 La. Ann. 108 (1883); *Lalancé Grosjean Mfg. Co. v. Wolff & Levi*, 28 La. Ann. 942 (1876); *Johnson v. Bloodworth*, 12 La. Ann. 699 (1857). *Cf. Wilmot & Co. v. Steamer Ouachita Belle*, 32 La. Ann. 607 (1880).

sales of immovables the resolutive action has been held to exist against the original purchaser and also third persons acquiring real rights or title to the property.³³⁴ The Civil Code does not specifically require recordation of sales of immovables as a prerequisite for the exercise of the right of dissolution against third persons and the Louisiana Supreme Court has held repeatedly that "the question of registry has nothing to do with the case."³³⁵ Thus, whether the original sale is or is not recorded, the unpaid vendor may obtain resolution and reclaim the immovable from a subsequent purchaser. The dissolution operates retroactively and all transfers or encumbrances made by the original purchaser are cancelled.³³⁶

Application of different rules to movables and immovables may be justified by several considerations. In general, immovable property has been protected by the law much more effectively than movable property; and, whereas security of titles to immovables is achieved by the system of public records, security of transaction and acquisition of movables is enhanced by the bona fide purchase doctrine. Thus, in the interest of security of transactions, the resolutive condition in case of nonpayment of the purchase price becomes inoperative against third possessors of movables. Availability of the right of dissolution against subsequent purchasers of an immovable where the original sale is not recorded is compatible with, and may be regarded as an application of, the public records doctrine. In such a case the vendor is the owner of record and third persons acquiring rights from the purchaser have a title which is "utterly null and void, except between the parties thereto" (Article 2266). Difficulties arise where the original sale is recorded because in that case the sub-

334. See *Ragsdale v. Ragsdale*, 105 La. 405, 29 So. 906 (1901); *Lebourgeois v. Lebourgeois*, 23 La. Ann. 757 (1871) (judgment creditors of the vendee); *Adler v. Adler*, 126 La. 472, 52 So. 688 (1910); *Johnson v. Bloodworth*, 12 La. Ann. 699 (1857) (mortgage creditors); *Torregano v. Segura's Syndic.*, 2 Mart. (N.S.) 158 (La. 1824) (chirographic creditors); *McKenzie v. Bacon*, 41 La. Ann. 6, 5 So. 640 (1899) (subsequent purchasers); *Stevenson v. Brown*, 32 La. Ann. 461 (1880) (purchaser at judicial sale).

335. *Louis Werner Saw Mill Co. v. White*, 205 La. 242, 17 So.2d 264, 266 (1944); *McKenzie v. Bacon*, 41 La. Ann. 6, 5 So. 640 (1889); *Stevenson v. Brown*, 32 La. Ann. 461 (1880). Cf. *Ragsdale v. Ragsdale*, 105 La. 405, 409, 29 So. 906, 907 (1901): "The failure to register this sale in the conveyance or mortgage records does not militate against the right of the vendor to enforce the resolutive condition."

336. See *Adler v. Adler*, 126 La. 472, 475, 52 So. 688 (1910): "That the judicial dissolution of a sale of real estate for non-payment of the [purchase] price frees the property from all mortgages and charges created by the purchaser, or resulting from his possession as owner, and the operation of law, is too well settled for dispute."

sequent purchaser acquires title from the owner of record, the purchaser who failed to fulfill his obligations. Even in such a case, however, it has been held that the subsequent purchaser acquires a defeasible title because the public records put him on notice as to the possible nonpayment of the price.³³⁷ The action for dissolution is inadmissible only where the third person relies on affirmative statements in the public records that the purchase price has been paid.³³⁸

The rule that in the absence of recordation the vendor's privilege on an immovable cannot be enforced against third persons, whereas dissolution can be enforced, may seem to involve a questionable distinction. In both instances the vendor is unpaid; but, while he cannot claim the purchase price, he can reclaim the property itself. Actually, there is no contradiction since, as it has been demonstrated, this result is fully compatible with the nature of the rights exercised and the public records doctrine. On the contrary, it is the availability of dissolution in spite of recordation of the sale that may conflict with the public records doctrine. Insofar as third persons are concerned, reliance on the public records ought to exclude dissolution of a recorded sale in the absence of affirmative indication in the records that the right has been reserved and that the price has not been paid. In appropriate cases Louisiana courts could reach this result on the basis of remedial legislation.³³⁹

In the light of the foregoing, one might be tempted to classify the vendor's right of dissolution as a personal right when the sale is of movable property and as a real right when object of the sale is an immovable. Accurate analysis, however, should regard the right of dissolution of a sale, whether relating to movable or immovable property, as a right to transform a legal relation-

337. See *Stevenson v. Brown*, 32 La. Ann. 461, 464 (1880): "One purchasing property must look to his titles. In the present case the title informed Wade that his vendor Brown had agreed that in the event of failure to pay the notes given for the price, the property was to revert to Stevenson." Cf. *Ragsdale v. Ragsdale*, 105 La. 405, 409, 29 So. 906, 908 (1901): "The underlying principle is that until the vendee pays the purchase price he holds by a defeasible title only, and all who deal with him are equally affected."

338. See *Schwing Lumber & Shingle Co. v. Arkansas Natural Gas Co.*, 166 La. 201, 116 So. 851 (1928) and authorities cited.

339. See La. Acts 1950, No. 7; LA. R.S. 9:2721-24 (1950). Cf. *Blevins v. Manufacturers Record Publishing Co.*, 235 La. 708, 771, 105 So.2d 392, 414 (1958): "A third party purchaser may rely upon the conveyance records and is not bound or barred by unrecorded claims against the property purchased"; *Jackson v. Golson*, 91 So.2d 394 (La. App. 2d Cir. 1956).

ship³⁴⁰ which is neither personal nor real. Indeed, distinction should be made between the right of dissolution available to a vendor and rights that arise after dissolution of a sale. Where the right of dissolution is validly exercised, the sale is dissolved *ex tunc* and the vendor is deemed never to have parted with his title in the property. Thus, after dissolution, the vendor exercises his *ownership* rights and is accordingly entitled to follow the thing in the hands of third persons as owner.³⁴¹ Loss of possession by the purchaser of movables, and acquisition of immovables by reliance on affirmative evidence in public records in the case of immovables, are merely circumstances determining availability of the right of dissolution and have nothing to do with the classification of this right as personal or real.

8. *Lessor's Rights: Special Privilege and Right of Pledge.*—According to Article 2705 of the Civil Code, "the lessor has, for the payment of his rent, and other obligations of the lease, a right of pledge on the movable effects of the lessee, which are found on the property leased." This right of pledge extends to "the effects . . . of the undertenant, so far as the latter is indebted to the principal lessee, at the time when the proprietor chooses to exercise his right" (Article 2706) and "also to those belonging to third persons, when their goods are contained in the house or store, by their own consent, express or implied" (Article 2707). In the last case, however, "movables are not subject to this right, when they are only transiently or accidentally in the house, store, or shop, such as the baggage of a traveller in an inn, merchandise sent to a workman to be made up or repaired, and effects lodged in the store of an auctioneer to be sold" (Article 2708).

In addition to this right of pledge, the lessor of immovable property has a *special privilege*³⁴² securing payment of the rent on "the crops of the year, and on the furniture, which is found in the house let, or in the farm, and on everything which serves to the working of the farm (Article 3217, Section 3). Right of pledge and special privilege are co-extensive and, as a result of

340. Cf. 1 ENNECERUS-NIPPERDEY, ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS 230 (1952).

341. "The vendor's action is one in revendication of the thing." *Stevenson v. Brown*, 32 La. Ann. 461, 464 (1880). Cf. *Castle v. Floyd*, 38 La. Ann. 583 (1886).

342. Cf. *O'Kelly v. Ferguson*, 49 La. Ann. 1230, 1245, 22 So. 783, 789 (1897): "We think the lessor has a double right—a right of pledge, with its right of detention, and included and resulting right of preference, and a right of privilege proper."

their combination, "the right which the lessor has over the products of the estate, and on the movables which are found on the place leased, for his rent, is of a higher nature than mere privilege. The latter is only enforced on the price arising from the sale of movables to which it applies. It does not enable the creditor to take or keep the effects themselves specially. The lessor, on the contrary, may take the effects themselves and retain them until he is paid" (Article 3218).

The lessor's privilege and right of pledge are incidental to and arise out of the contract of lease by operation of law.³⁴³ Ordinarily, it is essential to the existence of a pledge that the creditor be put into possession of the thing pledged.³⁴⁴ For the purpose of the lessor's pledge, however, the lessee's possession is that of the lessor.³⁴⁵ The lessor's privilege for rent on the particular movables to which it attaches is, as a general rule, superior to that of any other debt.³⁴⁶ The lessor may secure payment of the rent by a writ of sequestration.³⁴⁷ Article 2709 of the Civil Code provides that "the lessor may seize the objects subject to his privilege before the lessee removes them from the leased premises, or within fifteen days after they have been removed by the lessee without the consent of the lessor, if they continue to be the property of the lessee, and can be identified."³⁴⁸ According to settled jurisprudence, the lessor's rights of pledge and privilege on movables belonging to third persons are lost as soon as these things are removed from the premises whether with or without the consent of the lessor.³⁴⁹ Pledge and privilege on movables of the lessee are lost upon removal of these things from the premises with the consent of the lessor.³⁵⁰ In case of unauthorized removal, pledge and privilege are extinguished as soon as things belonging to the lessee lose their identity or are

343. See LA. CIVIL CODE arts. 2705-09, 3217(3), 3218 (1870); DAGGETT, *LOUISIANA PRIVILEGES AND CHATTEL MORTGAGE* 172 (1942).

344. See LA. CIVIL CODE art. 3152 (1870).

345. See *Villere v. Succession of Shaw*, 108 La. 71, 32 So. 196 (1902); *Arick v. Walsh & Boisseau*, 23 La. Ann. 605 (1871). *Cf.* LA. CIVIL CODE art. 3433 (1870).

346. See DAGGETT, *LOUISIANA PRIVILEGES AND CHATTEL MORTGAGE* 191 (1942).

347. See LA. CODE OF CIVIL PROCEDURE arts. 3571, 3572, 3575 (1960).

348. See LA. CIVIL CODE art. 2709 (1870), *as amended*, La. Acts 1960, No. 30, § 1.

349. See *Kupperman v. Moore*, 185 La. 1000, 171 So. 104 (1936); *Merrick, Race & Foster v. La Hache*, 27 La. Ann. 87 (1875); *Hughes v. Caruthers*, 26 La. Ann. 530 (1874); *Lesseps v. Ritcher*, 18 La. Ann. 653 (1866). *But cf.* *Ritchie v. White*, 11 Mart.(O.S.) 239 (La. 1822) (privilege on movables of third persons continues for fifteen days after removal).

350. See *Boyston v. Jones*, 153 So. 53 (La. App. 2d Cir. 1934).

acquired by a third person in good faith³⁵¹ and after the lapse of fifteen days, even if the things still belong to the lessee and can be identified.³⁵²

The juridical nature of the lessor's combined rights of pledge and privilege is controversial. In France, the lessor may assert his pledge and privilege within certain time limits even on movables removed from the premises and alienated.³⁵³ The prevailing view, therefore, regards the rights of the lessor as amounting to a veritable (though qualified) pledge, namely a privileged real right.³⁵⁴ In Louisiana, it has been said that "a pledge is a privilege with the right of retention of the property pledged" and "this is precisely the lessor's right."³⁵⁵ This statement is inaccurate insofar as it reduces the *real* right of pledge to a mere privilege, contrary to the historical sources and the doctrine underlying the Civil Code. But it is fully justified insofar as it analyzes the nature of the lessor's rights in Louisiana. Unlike the situation in France, the lessor in Louisiana cannot assert his rights against property in the hands of third persons who have acquired title. The lessor in this state does not have the right to follow the movables but merely a *right of retention* and a *right of preference*, a privilege on movables while they are on the premises and for fifteen days after their removal if they still

351. In case of fraudulent or collusive transfer of the lessee's movables to third persons, the lessor has an action *ex delicto* against the perpetrators of the fraud or collusion. See *Hyman v. Hibernia Bank & Trust Co.*, 144 La. 1074, 81 So. 718 (1919); *id.*, 139 La. 411, 71 So. 598 (1916); *Worrell v. Vickers*, 30 La. Ann. 202 (1878); *Kidd v. Terrel*, 145 So. 23 (La. App. 2d Cir. 1932). It has been stated that the lessor's pledge is "property" and that prescription of the lessor's action against the participants in the fraud of the lessee does not run while the lessor is deliberately kept in ignorance. See *Hyman v. Hibernia Bank & Trust Co.*, 139 La. 411, 71 So. 598 (1916).

352. See *Carroll v. Bancker*, 43 La. Ann. 1078, 10 So. 187 (1891); *Conrad v. Patzelt*, 29 La. Ann. 465 (1877); *Silliman v. Short, Martin & Hall*, 26 La. Ann. 512 (1874); *Farnet, Noel & Guirard v. Creditors*, 8 La. Ann. 372 (1853); *Hanna v. Creditors*, 12 Mart. (O.S.) 32 (La. 1822); *General Motors Acceptance Corp. v. Hand*, 133 So. 466 (La. App. 2d Cir. 1931).

353. Article 2102 of the French Civil Code provides that the lessor preserves his privilege and may seize movables removed from the premises without his consent, provided that he "revendicates" movables contained in a farm within forty days and movables contained in a house within fifteen days. Ordinarily, the delay commences to run from the day of the removal; but in case of fraudulent concealment of the removal the delay runs from the day the lessor acquires knowledge of the fact. Article 2279 of the French Civil Code does not apply during this delay; thus, ordinarily, the lessor can claim things alienated by the lessee and possessed by third persons in good faith. A limited protection is accorded to purchasers in good faith under Article 2280 of the French Civil Code, corresponding to Article 3507 of the Louisiana Code. See 12 *PLANIOU ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 280 (1953).

354. See 12 *PLANIOU ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 273 (1953).

355. *Villere v. Succession of Shaw*, 108 La. 71, 73, 32 So. 196 (1902).

belong to the lessee and can be identified. True, the Code declares that the lessor has a "pledge" rather than a "mere privilege."³⁵⁶ But a veritable pledge is a real right conferring on the pledgee both a right of retention and a right to follow the property,³⁵⁷ while the lessor's pledge confers only a right of retention. Thus, in functional terms, the cumulation of the lessor's right of pledge and privilege in Louisiana produces a right of preference fortified by a right of retention and resembling "pledge" because of this last characteristic.³⁵⁸ The lessor's combined right, therefore, is neither a personal nor a real right but the *quality*³⁵⁹ of a right deriving from lease, a contract creating personal rights.

9. *Promise To Sell Immovables.* — On several occasions, the Louisiana Supreme Court has declared that "a promise of sale, duly accepted and recorded, confers a real right on the purchaser."³⁶⁰ Relying on these declarations, an able student reached

356. Cf. LA. CIVIL CODE arts. 2705, 3218 (1870). Article 3220 of the Civil Code distinguishes clearly between the real right of pledge and the right of preference (privilege) attached thereto: "The creditor acquires the right of possession and retaining the movable which he has received in pledge, as security for his debt, and may cause it to be sold for the payment of the same. Hence proceeds the privilege which he enjoys on the thing."

357. See LA. CIVIL CODE art. 3158 (1870). Article 3162 of the Civil Code declares that "in no case does this privilege subsist on the pledge, except when the thing pledged . . . has been actually put and remained in the possession of the creditor, or of a third person agreed on by the parties." This does not mean that the pledgee is deprived of the *right to follow* the thing pledged but that his *right of preference* cannot be exercised if the thing is in the possession of third persons. This becomes clear in the light of Article 3220 of the Civil Code which declares that the pledgee "acquires the right of possession." Cf. Succession of Picard, 238 La. 455, 115 So.2d 817 (1959). See also Article 2701 of the Louisiana Code of Civil Procedure which provides for a statutory *pactum de non alienando* attached to a "mortgage or privilege evidenced by authentic act." Accordingly, if the pledgee loses possession, he can reclaim the thing in the hands of third parties. His right to follow the thing, however, may be defeated in certain cases as a result of the *bona fide* purchaser doctrine. But cf. Slovenko, *Of Pledge*, 33 TUL. L. REV. 59, 75 (1958) asserting that pledge does not confer the right to follow. Elsewhere, however, the author indicates that pledge is a "real right" (*id.* at 60, 103), "the most real of the real securities" (*id.* at 59, n. 2) and that "the pledge creditor has legal possession and hence has the benefit of the usual real actions for retaining and recovering possession" (*id.* at 125). It would seem that a real right, by definition, *ought* to include the right to follow and that protection of the pledgee's possession is the essence of this last right. But, while the possession of the pledgee is protected under Louisiana law, it is doubtful whether the real actions of the Code of Civil Procedure are applicable in this context. Cf. text at note 69 *supra*.

358. Cf. Pickens v. Webster, 31 La. Ann. 870 (1879) ("quasi-pledge"); Case v. Kloppenburg, 27 La. Ann. 482 (1875).

359. See BAUDRY-LACANTINIERE, *TRAITÉ DE DROIT CIVIL, V SUPPLEMENT* by Bonnecase 478 (1930); GINOSSAR, *DROIT RÉEL, PROPRIÉTÉ ET CRÉANCE* 131 (1960).

360. Kingberger v. Drouet, 149 La. 986, 999, 90 So. 367, 372 (1922). See also Lehman v. Rice, 118 La. 975, 43 So. 639 (1907); Barfield v. Saunders, 116 La. 136, 40 So. 593 (1906). Cf. 1 TROPLONG, *DE LA VENTE* 344 (1856).

the conclusion that "an option to buy" an immovable is a real right in Louisiana.³⁶¹ This is only a half-truth.

A promise to sell (or the corresponding option to buy) cannot be regarded as a real right by any stretch of analysis. This transaction, if recorded, merely confers a right on the prospective purchaser to perfect the sale as of the time of recordation in case interests of third parties are involved.³⁶² A perfected sale is a transaction "translative" of title under the Civil Code and the purchaser becomes "owner" of the immovable sold without the need of delivery of possession.³⁶³ As between the parties, ownership is deemed transferred from the time of the sale but this ownership can be asserted against third parties only from the time of delivery of possession and recordation.³⁶⁴ Thus, the "specific performance" which the purchaser claims, and is entitled to, under Article 2462 of the Louisiana Civil Code is nothing else but a *revendication* and an exercise of his right of ownership.³⁶⁵ The so-called "real right" of the purchaser, therefore, is not a real right distinct from ownership.

361. See Comment, *Real Rights in Louisiana*, 21 LA. L. REV. 462, 466 (1961).

362. See *Watson v. Bethany*, 209 La. 989, 26 So. 2d 12 (1946); *Kingberger v. Drouet*, 149 La. 886, 90 So. 367 (1922); *Lehman v. Rice*, 118 La. 975, 43 So. 639 (1907); *Barfield v. Saunders*, 116 La. 136, 40 So. 593 (1906).

363. See LA. CIVIL CODE art. 2456 (1870).

364. See LA. CIVIL CODE art. 2442 (1870).

365. See *Watson v. Bethany*, 209 La. 989, 26 So. 2d 12 (1946).